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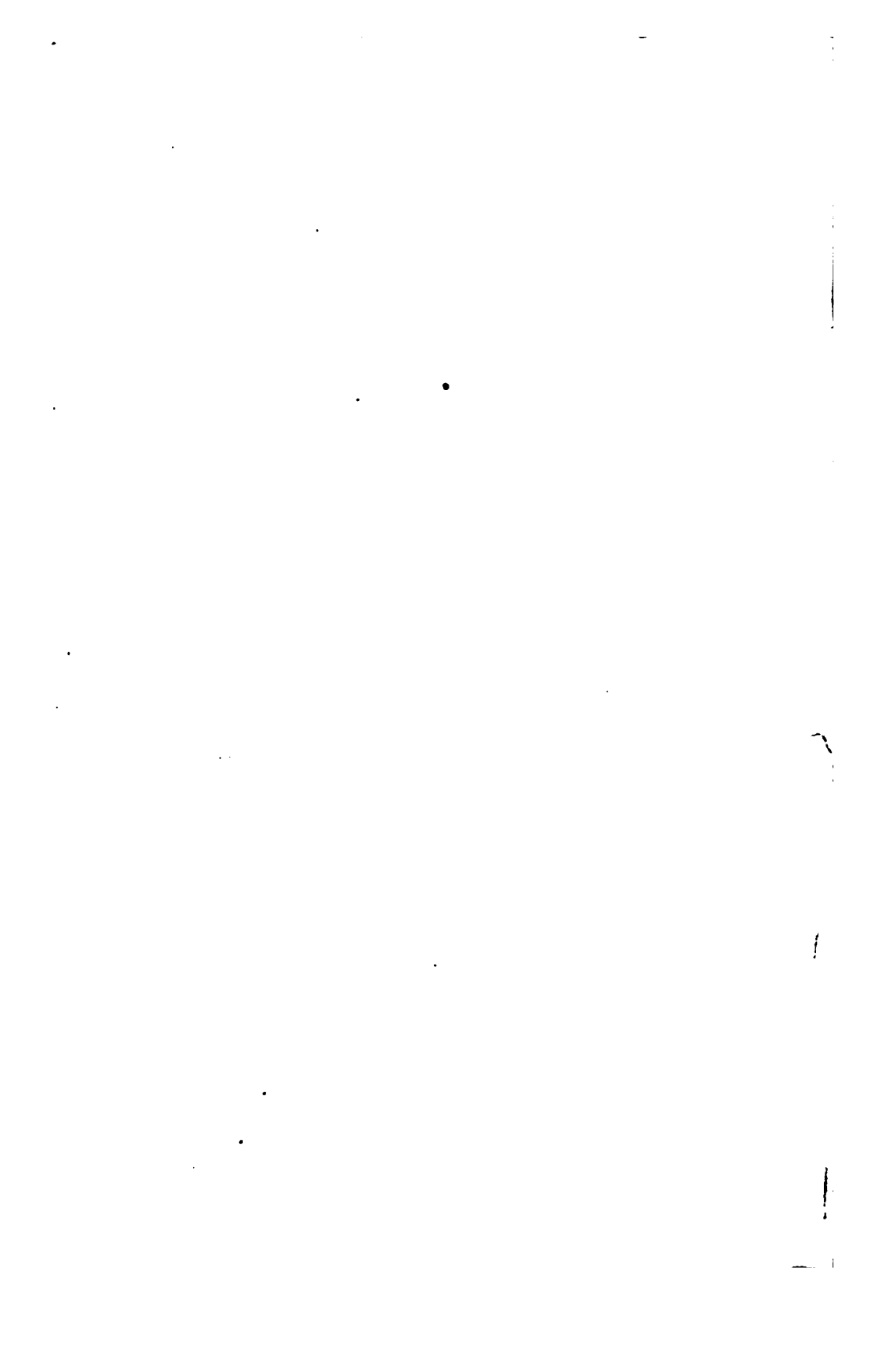


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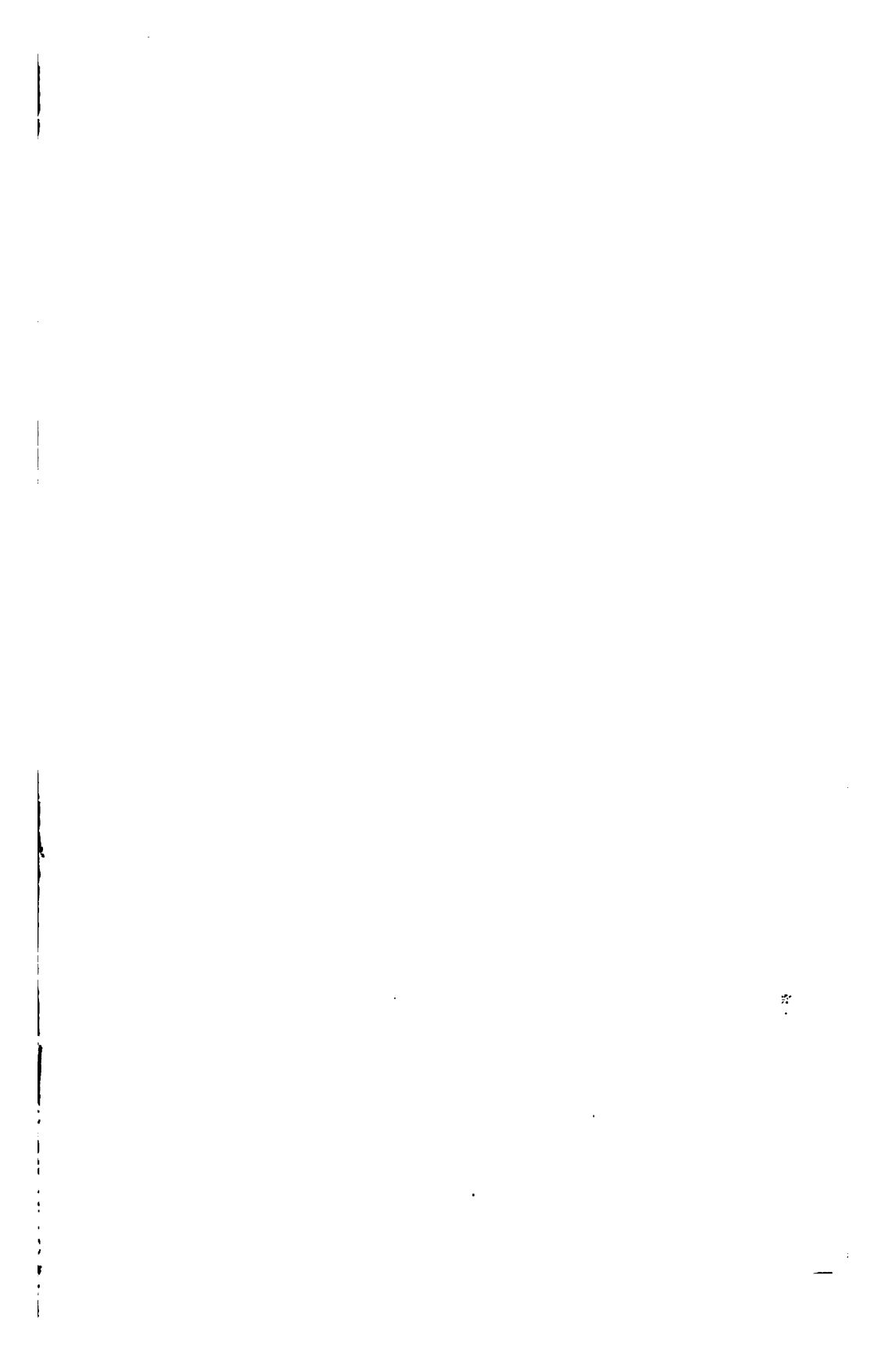
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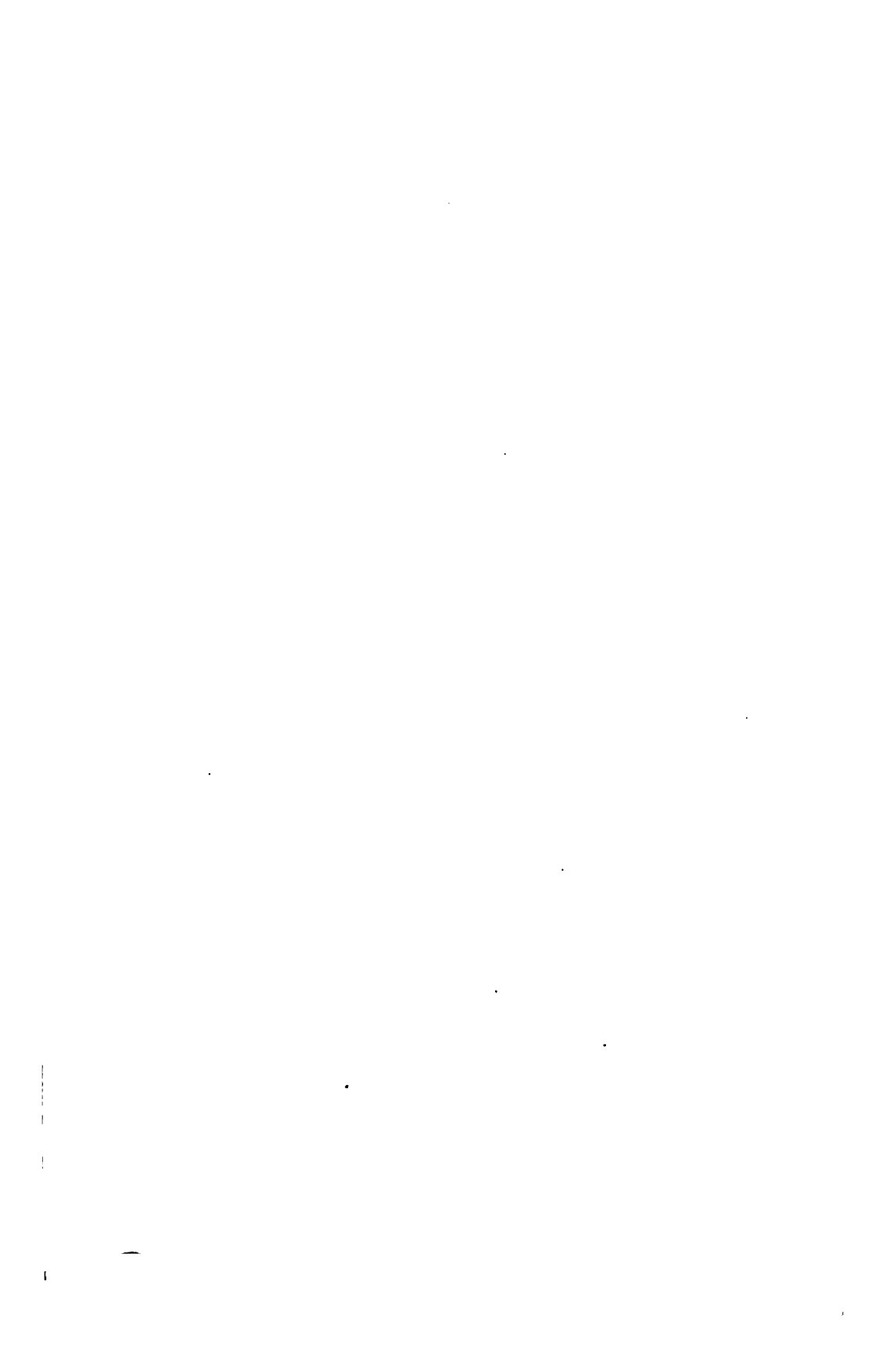
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REPORTS  
OF  
CASES ARGUED AND ADJUDGED  
IN THE  
COURT OF APPEALS OF TEXAS  
DURING THE  
AUSTIN TERM, 1884.  
REPORTED BY  
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*Rec. Apr. 27, 1885*

# COURT OF APPEALS OF STATE OF TEXAS.

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## **PRESIDING JUDGE:**

**HON. JOHN P. WHITE.**

## **JUDGES:**

**HON. JAMES M. HURT.**

**HON. SAMUEL A. WILLSON.**

## **ATTORNEY GENERAL:**

**JOHN D. TEMPLETON, Esq.**

## **ASSISTANT ATTORNEY GENERAL:**

**JAMES H. BURTS, Esq.**

## **CLERKS:**

**JAMES L. WHITE, AT AUSTIN.**

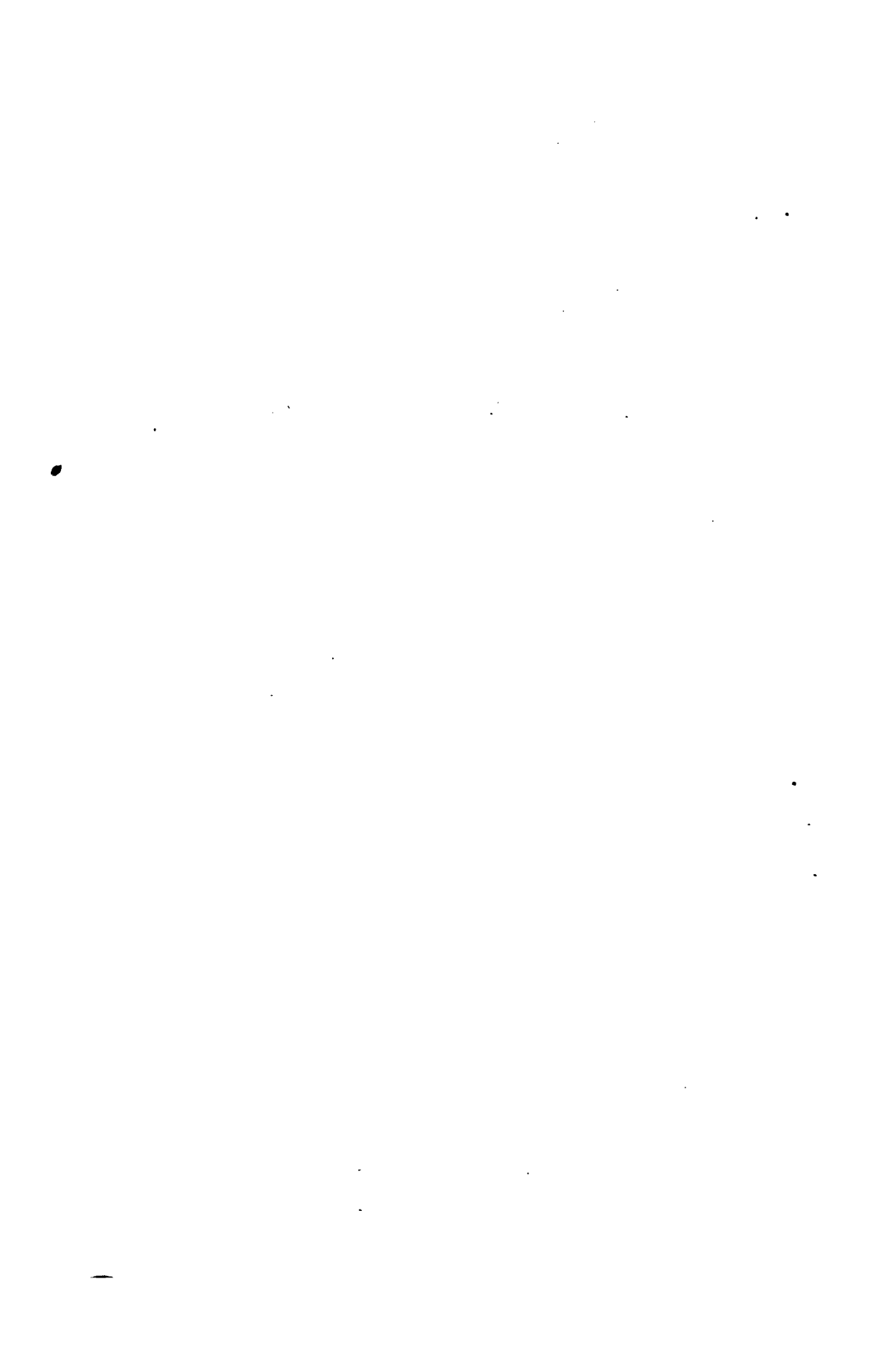
**E. P. SMITH, AT TYLER.**

**HORACE A. MORSE, AT GALVESTON.**

## **REPORTERS:**

**A. M. JACKSON.**

**A. M. JACKSON, JR.**



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Criminal causes decided without written opinions.

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CRIMINAL CAUSES DECIDED WITHOUT WRITTEN OPINIONS AT  
THE AUSTIN TERM, 1884.

<i>Style of Case.</i>	<i>County.</i>	<i>Grade of offense.</i>	<i>Disposition.</i>
<b>A.</b>			
Adams v. State .....	Comanche....	Felony .....	Affirmed.
<b>B.</b>			
Bela v. State.....	Wilson .....	Felony .....	Dismissed.
Benavides v. State.....	McMullen ...	Felony .....	Affirmed.
Bender v. State.....	Collin .....	Felony .....	Affirmed.
Bender v. State.....	Collin .....	Felony .....	Affirmed.
Bender v. State.....	Collin .....	Felony .....	Affirmed.
Perliner v. State. ....	Bexar.....	Misdemeanor.	Dismissed.
Berry v. State.....	Collin .....	Scire Facias..	Affirmed.
Best v. State.....	Fannin.....	Misdemeanor.	Affirmed.
Blevins v. State.....	Brown .....	Felony .....	Affirmed.
Blevins v. State.....	Brown .....	Felony .....	Affirmed.
Bowlen v. State.....	Orange .....	Felony .....	Affirmed.
Brawlie v. State'.....	Coleman ...	Felony .....	Dismissed.
Breeding v. State .....	Milam.....	Misdemeanor.	Affirmed.
Bowen v. State....	Travis.....	Felony .....	Affirmed.
Broadnax v. State.....	Frio .....	Felony .....	Affirmed.
Brown v. State.....	Bexar.....	Felony .....	Affirmed.
<b>C.</b>			
Cain v. State.....	Dallas.....	Misdemeanor.	Dismissed.
Calloway v. State.....	Anderson....	Felony .....	Affirmed.
Coburn <i>et al.</i> v. State.....	Montgomery.	Felony .....	Affirmed.
Craig v. State .....	Brown.....	Misdemeanor.	Dismissed.
<b>D.</b>			
Darnell v. State .....	Guadalupe...	Felony .....	Affirmed.
Davis v. State.....	Denton.....	Misdemeanor.	Affirmed.
Deatherage v. State.....	Runnels .....	Felony .....	Affirmed.
Dorsey v. State .....	Brown.....	Felony .....	Affirmed.
Duncan v. State .....	Hood.....	Misdemeanor.	Affirmed.
Duncan v. State .....	Hood.....	Misdemeanor.	Dismissed.
<b>E.</b>			
Evins v. State.....	Parker .....	Felony .....	Affirmed.
<b>F.</b>			
Fagg v. State.....	Brown... ..	Misdemeanor.	Dismissed.
Faulkner v. State....	Lamar.....	Misdemeanor.	Affirmed.
Fisher v. State.....	Tom Green...	Felony .....	Affirmed.
Fondren v. State.....	Ellis.....	Misdemeanor.	Affirmed.
Fondren v. State.....	Ellis.....	Misdemeanor.	Affirmed.
Frick v. State .....	Travis .....	Misdemeanor.	Dismissed.
Fuller v. State.....	Bell .....	Felony .....	Affirmed.

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 Criminal causes decided without written opinions.
 

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<i>Style of Case.</i>	<i>County.</i>	<i>Grade of offense.</i>	<i>Disposition.</i>
<b>G.</b>			
Garcia v. State .....	Kinney.....	Misdemeanor .	Affirmed.
Garza v. State .....	Bexar .....	Felony .....	Affirmed.
Garza v. State .....	Atascosa .....	Felony .....	Affirmed.
Garza v. State .....	Atascosa.....	Felony .....	Affirmed.
Gazeway v. State .....	Bastrop .....	Felony .....	Affirmed.
Glenn v. State .....	Erath.....	Felony .....	Affirmed.
Goff v. State.....	Lamar .....	Felony .....	Affirmed.
Gordon v. State.....	Fannin.....	Misdemeanor .	Affirmed.
Greenwood v. State.....	Caldwell .....	Felony .....	Affirmed.
<b>H.</b>			
Harris v. State.....	Ellis.....	Misdemeanor .	Dismissed.
Hart v. State .....	Grayson.....	Felony .....	Dismissed.
Hedges v. State.....	El Paso.....	Felony .....	Dismissed.
Hefner v. State .....	Wilbarger....	Felony .....	Dismissed.
Hernandez v. State .....	Bexar ...	Felony .....	Affirmed.
Hester v. State .....	Brown.....	Misdemeanor .	Affirmed.
Hill v. State .....	Bowie.....	Felony .....	Affirmed.
Hill v. State .....	Brown.....	Felony .....	Affirmed.
Hubbard v. State.....	Bell.....	Misdemeanor .	Affirmed.
<b>J.</b>			
Johnson v. State.....	Atascosa . ...	Felony .....	Affirmed.
Joynes v. State .....	Milam. ....	Misdemeanor .	Affirmed.
<b>K.</b>			
Kain v. State .....	Dallas .....	Misdemeanor .	Affirmed.
Kain v. State .....	Dallas .....	Misdemeanor .	Affirmed.
Kain v. State.....	Dallas .....	Misdemeanor .	Affirmed.
<b>L.</b>			
Lee v. State.....	Callahan ....	Misdemeanor .	Affirmed.
Logue v. State.....	Denton.....	Misdemeanor .	Affirmed.
Lungford v. State.....	Grayson.....	Felony .....	Affirmed.
Lyendecker v. State.....	Bell.....	Misdemeanor .	Affirmed.
Lynn v. State... ..	Milam.....	Misdemeanor .	Affirmed.
<b>M.</b>			
Mahan v. State .....	Smith .....	Felony .....	Affirmed.
Maxwell v. State... ..	Presidio .....	Felony .....	Affirmed.
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McDaniel v. State.....	Brazoria.....	Felony .....	Affirmed.
McGinnis v. State.....	Erath... ..	Felony .....	Affirmed.
McMahon v. State....	McLennan....	Misdemeanor .	Affirmed.
Meyer v. State .....	Hays.....	Felony .....	Dismissed.
Miles v. State.....	Bastrop .....	Habeas corpus	Affirmed.
Miles v. State.....	Bastrop .....	Habeas corpus	Affirmed.
Mims v. State.....	Caldwell .....	Felony .....	Affirmed.
Moore v. State.....	Ellis.....	Felony .....	Affirmed.
Moore v. State.....	Milam.....	Felony .....	Affirmed.
Montgomery v. State.....	Kinney.....	Felony .....	Affirmed.
Morrison v. State.....	Johnson.....	Felony .....	Affirmed.



## Criminal causes decided without written opinions.

<i>Style of Case.</i>	<i>County.</i>	<i>Grade of Offense.</i>	<i>Disposition.</i>
<b>N.</b>			
Neal v. State .....	Coleman... ..	Felony .....	Dismissed.
<b>O.</b>			
Oscar v. State .....	Robertson....	Misdemeanor .	Affirmed.
<b>P.</b>			
Parker v. State .....	Parker .....	Misdemeanor .	Dismissed.
Parks v. State.....	Parker .....	Misdemeanor .	Dismissed.
Pickelsimer v. State .....	Erath .....	Felony .....	Affirmed.
Platt v. State .....	Falls .....	Felony .....	Affirmed.
<b>R.</b>			
Ranzan v. State.....	Kendall.....	Misdemeanor .	Affirmed.
Raspberry v. State .....	Guadalupe ..	Felony .....	Affirmed.
Reaves v. State ..	Denton.....	Felony .....	Affirmed.
Richardson v. State .....	Palo Pinto ...	Misdemeanor .	Dismissed.
Ricketson v. State.....	Ellis.....	Misdemeanor .	Dismissed.
Ricketson v. State.....	Ellis.....	Misdemeanor .	Dismissed.
Ricketson v. State.....	Ellis.....	Misdemeanor .	Dismissed.
Ricketson v. State.....	Ellis.....	Misdemeanor .	Dismissed.
Ricketson v. State.....	Ellis.....	Misdemeanor .	Dismissed.
Roach v. State .....	Walker.....	Felony .....	Dismissed.
Robertson v. State.....	Hays .....	Habeas corpus	Affirmed.
Robertson <i>et al.</i> v. State....	Robertson....	Scire facias ..	Affirmed.
Rolin v. State.....	Fannin.....	Felony .....	Affirmed.
Ross v. State .....	Wise .....	Misdemeanor .	Affirmed.
Rubirth v. State. ....	Travis .....	Habeas corpus	Affirmed.
Rush v. State... ..	Dallas .....	Misdemeanor .	Affirmed.
<b>S.</b>			
Sandoval v. State.....	Bexar .....	Felony ... ..	Affirmed.
Sanner v. State.....	Tarrant .....	Misdemeanor .	Affirmed.
Santos v. State .....	Frio.....	Felony .....	Dismissed.
Sherrod v. State.....	Brown.....	Misdemeanor .	Affirmed.
Slasson v. State.....	Robertson....	Misdemeanor .	Dismissed.
Smith v. State.....	Bowie .....	Felony .....	Affirmed.
Smith v. State.....	Hill .....	Felony .....	Affirmed.
<b>T.</b>			
Terrell <i>et al.</i> v. State.....	Bosque.....	Scire facias... ..	Affirmed.
Townley <i>et al.</i> v. State.....	Robertson....	Scire facias... ..	Affirmed.
Townley <i>et al.</i> v. State.....	Robertson....	Scire facias... ..	Affirmed.
Trevino v. State .....	Kinney.....	Felony .....	Affirmed.
Turner v. State.....	Brown.....	Misdemeanor .	Dismissed.
<b>V.</b>			
Villa v. State .....	Galveston....	Felony .....	Affirmed.
<b>W.</b>			
Ward v. State.....	Medina.....	Habeas corpus	Affirmed.
Welling v. State.....	Falls .....	Felony .....	Affirmed.
Wells v. State.....	Bexar .....	Felony .....	Affirmed.
White v. State.....	Ellis.....	Misdemeanor .	Dismissed.

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 Criminal causes decided without written opinions.
 

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<i>Style of Case.</i>	<i>County.</i>	<i>Grade of Offense.</i>	<i>Disposition.</i>
White v. State.....	Wise .....	Felony .....	Affirmed.
Williams v. State.....	Colorado.....	Felony .....	Affirmed.
Williams v. State.....	Franklin .....	Felony .....	Affirmed.
Williams v. State.....	Hamilton.....	Felony .....	Affirmed.
Wortham v. State.....	Bosque .....	Misdemeanor .	Affirmed.
Wynne v. State.....	Walker.....	Felony .....	Affirmed.

## ERRATA.

In the case of *Ogle v. The State*, it is erroneously stated, on page 362, that the case was appealed from the county of Falls, and that the conviction was of murder in the *first* degree. The conviction was of murder in the *second* degree, and the cause was appealed from the District Court of Hill county.

# COURT OF APPEALS OF TEXAS.

AUSTIN TERM, 1884.

---

No. 2932.

DANIEL HARDEMAN v. THE STATE.

1. **FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY.**—To constitute the offense denounced by Article 797 of the Penal Code, the property upon which the lien was given must have been "personal or movable property" at the time the lien was executed. The sale or other disposition of real property on which the owner had executed a written lien is no offense against the laws of this State.
2. **SAME—PLEADING.—REPUGNANCY** in an indictment arises when it contains an allegation which is directly contradicted by other statements in the indictment. See the opinion in this case in illustration.
3. **SAME.—MOVABLE PROPERTY** is such as attends the person of the owner wherever he goes, in contradistinction to things immovable. Under this rule it is *held* that a growing crop is immovable property. See the opinion *in extenso* on the question.
4. **SAME—PERSONAL PROPERTY—INDICTMENT.**—If the property sold or otherwise disposed of while subject to an existing written lien be personal though not movable property, the sale or disposition of it brings the offense within the meaning of Article 797 of the Penal Code. But, to be sufficient to charge the offense, the indictment must allege that the property was personal property.
5. **SAME.**—An ungathered crop still appendant to the ground can, under no circumstances, be held movable property, and cannot partake of the character of personal property until ready for harvest.
6. **SAME—INDICTMENT.**—The indictment charged in substance that, having executed a valid mortgage lien in writing upon "eighteen acres of cotton, then and there being movable property," the defendant subsequently sold the same with intent to defraud his mortgagee. *Held*, insufficient to charge any offense against the laws of this State.

APPEAL from the District Court of Ellis. Tried below before the Hon. G. N. Aldredge.

A

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**Statement of the case.**

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The offense attempted to be charged against the appellant was the fraudulent disposition of mortgaged property, the count against him in the indictment being in substance that, having on the third day of June, 1882, executed to one J. E. Wilson a valid mortgage lien in writing "upon eighteen acres of cotton, then and there being movable property," he subsequently, on the first day of October, 1882, sold the said cotton to divers persons with intent to defraud the said Wilson. The jury rendered a verdict of guilty against the appellant, and assessed his punishment at confinement in the penitentiary for the term of two years.

The State first introduced in evidence the mortgage described in the indictment, and, by the witness J. E. Wilson, proved its execution by the appellant. Wilson further testified that the mortgage had never been satisfied. He had never consented to the sale of the cotton by the appellant to any one. Subsequent to the execution of the mortgage the appellant had avoided the witness. The witness, however, encountered the appellant in Waxahachie, in September, 1883, and asked him about the debt. Appellant replied that witness could not make it out of him. He then asked the witness if Felix Hardeman had not paid the debt for him. Witness replied that he had not. The appellant then said that a man living on Chambers creek owed him twenty-five dollars, which he would collect and pay over to the witness. Witness never saw the appellant afterwards until his arrest.

The substance of the testimony of Richard Cunningham, a witness for the State, was that, in the fall of 1882, through a third party, he purchased of the appellant the cotton crop grown by him that year.

Felix Hardeman, introduced by the defendant, denied that he ever promised to pay the defendant's debt to Wilson, that he had ever paid, or that he had ever told Sims, John Hardeman or other person that he had paid or had ever agreed to pay it. Witness owed the defendant nothing; the balance of ten dollars which he once owed the defendant for work having been boarded out with him by defendant after he quit work for him. Defendant told the witness of the mortgage just after its execution, and cautioned witness in the event he should encounter Wilson, to make his statement of the mortgage transaction harmonize with the defendant's statement to him, the witness, regarding the mortgage. The defendant's witnesses had attempted to prevail upon the witness to testify that he, the witness, was in

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the defendant's debt, and had promised to pay Wilson the amount of the claim he held against the defendant.

W. D. Sims, for the defendant, testified that the defendant worked two months for Felix Hardeman in the spring of 1882. Witness asked Felix if he had not promised to pay the defendant's debt to Wilson. Felix replied that he had so promised, and the witness communicated the fact to the defendant.

John Hardeman, the defendant's brother, testified in his behalf that in the summer of 1883 Felix Hardeman told him that pursuant to a promise he had previously made the defendant, he had paid the defendant's debt to Wilson. Witness asked to see the receipt. Felix replied that he did not have it at hand. Not satisfied, the witness went to Wilson and asked him of the truth of this statement. Wilson said that Felix was a liar, and that if he faced him with such a statement he, Wilson, would "jug" him. Witness repeated this to Felix in presence of the defendant, and Felix said that Wilson was a d—d liar, and that he would face him.

The motion for new trial assailed the competency of the mortgage as evidence, because not properly acknowledged, and not of record, and denounced the verdict as unauthorized by the evidence.

*Amzi Bradshaw*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** In substance the indictment charges that the defendant, on the third day of June, 1882, executed to J. E. Wilson a valid mortgage lien, in writing, upon "eighteen acres of cotton, then and there being movable property," "and that he thereafter, on the first day of October, 1882, sold said cotton to divers persons with intent to defraud said Wilson," etc.

To constitute the offense attempted to be charged in this indictment, the property upon which the lien was given must have been "personal or movable property" at the time such lien was executed. (Penal Code, Art. 797.) It is no offense against the law of this State to sell or otherwise dispose of real property upon which the owner has given a written lien.

Before proceeding further we should determine what meaning should be given to the words "eighteen acres of cotton," used in the indictment in describing the property mortgaged.

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We think that but one reasonable signification can be placed upon them, and that is that the property consisted of a cotton crop growing upon eighteen acres of land. This would be the ordinary signification of the words, and they must be thus understood. (Rev. Stats., Art. 3138; Penal Code, Art. 10.)

What character of property is a crop of growing cotton, considered with reference to the offense of which defendant stands convicted? Is it "movable property" within the meaning of Article 797 of the Penal Code? If not, then it is unnecessary to consider this case further, because it is to that character of property alone that this indictment applies.

It is true that the indictment alleges that the eighteen acres of cotton were *movable* property. Such allegation, however, is but a conclusion of the pleader's and is not sufficient unless the other statements show that it was that kind of property. Thus, suppose the allegation had been that the property consisted in eighteen acres of land, followed by another allegation that the land was movable property; it would not be contended that the latter controlled the former allegation, and that therefore the indictment charged the offense known to the law. The two allegations would be repugnant to and contradictory of each other, and the indictment would unquestionably be bad. But suppose in the case before us the allegation had been that the property consisted in so many pounds of cotton, and that the same was personal property, or was movable property, these allegations would have been consistent with each other, and the latter would have determined the character of the property. In this case the allegation that the property was *movable* can add nothing to the sufficiency of the indictment, unless the description of the property, "eighteen acres of cotton," may mean cotton in that state or condition which would render it movable property.

We now recur to the question, is growing cotton *movable* property, as alleged in the indictment? "Movable" property is such as attends a man's person wherever he goes, in contradistinction to things *immovable*. (2 Bouvier's Law Dic., word "*Movables*.") Thus money, jewelry, clothing, household furniture, boats and carriages are said to follow the person of the owner wherever he goes; they need not be enjoyed in any particular place; and hence they are *movable*. (1 Schouler's Per. Prop., p. 25.) Certainly a crop of cotton growing upon land cannot by any stretch of the rules of construction be brought

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within this definition of movable property. It is most clearly a thing immovable. It may, however, become movable. Says the author last quoted: "Fruits, so long as they are hanging on the trees, *the crops until they are gathered*, and timber trees while they are standing, are *things immovable*, or real estate, because they are attached and appendant to the ground. But when the fruits or crops are gathered, or the trees cut down, as they then cease to be attached to the soil, they become *movables*." (1 Schouler's Per. Prop., p. 123.) We think it too plain to be controverted, or to require a further investigation of authorities, that a crop of growing cotton is *immovable* property, and is not within the meaning of "movable property" as used in the article of the Penal Code under which this conviction was obtained.

But it may be said that the cotton was *personal* if not *movable* property, and if so that the offense attempted to be charged could be committed in relation to it. This position is correct. If the property be either *personal* or *movable* it is the subject of the offense denounced by the Code. It is to be observed, however, that this indictment does not allege, or in any manner show, that the property was *personal* property. It characterizes the same as *movable* property, and the two words are by no means synonymous in their legal signification, and do not mean the same thing in the Code. There may be *personal* property which is not *movable*. *Personal* property not only includes *movable* property, but more. It is a more comprehensive word. Thus, crops growing upon land are held to be *personal* property, so far as not to be considered an interest in land, under the Statute of Frauds. (2 Bouvier's Law Dic., "Personal Property.") So annual crops, *if fit for harvest*, may acquire the character and incidents of personal property, so far as to be subject to execution as personal chattels. (*Horne v. Gambrell*, W. and W. Con. Rep., sec. 997.) But it has never been held that an un-gathered crop, still appendant to the ground, is, under any circumstances, *movable* property. Whilst the question as to whether or not cotton growing is *personal* property within the meaning of the article of the Code referred to, is not presented directly for our determination, we deem it not improper for us to say that in our opinion crops do not become *personal* property, as a general rule, until they are ready to be harvested. Until that time they are regarded as partaking of the realty. (1 Schouler's Per. Prop., p. 123, *et seq.*; Freeman on Executions,

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sec. 113.) In this case it appears from the indictment that the lien upon the cotton was given in the month of June, at which time the crop could not have been ready for gathering, and it was not, therefore, personal property.

In our opinion the indictment charges no offense against the law of this State, and the court erred in overruling the defendant's motion in arrest of judgment, based upon its insufficiency; wherefore the judgment is reversed and the prosecution is dismissed.

*Reversed and dismissed.*

Opinion delivered April 12, 1884.

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[No. 2902.]

JEROME HALL v. THE STATE.

1. AGGRAVATED ASSAULT AND BATTERY—INDICTMENT—EVIDENCE.—The first count in the indictment alleged that the assault and battery was committed by an adult male upon a female. An adult is a person who has attained the full age of twenty-one years. The defendant produced the positive testimony of his father that he was not twenty-one years of age at the time of the trial. The only testimony tending to contradict this evidence was the statement of the prosecutrix, who testified that she thought the defendant was twenty-one years old, but whether this had reference to the time of the offense or that of the trial does not appear, nor did the witness testify that she knew the age of the defendant. *Held*, first, that the evidence was insufficient to support the allegation that the defendant was an adult male; and second, that the mere opinion of the State's witness was not sufficient to confute the positive testimony of the defendant's.
2. SAME—DECREPIT PERSON.—The word "decrepit," as used in Article 496 of the Penal Code, has a more comprehensive meaning than that given to it by lexicographers, and a "decrepit person" must be held to be one who is disabled, incapable or incompetent from either physical or mental weakness or defects, whether produced by age or other causes, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength. Decrepitude may exist without the supervention of age. See the opinion for evidence *held* insufficient to support the allegation that the assaulted person was a decrepit person.
3. SAME—CHARGE OF THE COURT.—The third count in the indictment alleged that the defendant went into the house of a private family and



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there committed the assault and battery. The evidence disclosed that the assault occurred in the house of the defendant's father, of whose family the defendant was a member, and of which house he was an occupant. *Held*, that the evidence was insufficient to bring the offense within the meaning of subdivision 3 of Article 496 of the Penal Code, wherefore the court did not err in omitting to instruct the jury upon that count.

APPEAL from the County Court of Grayson. Tried below before the Hon. S. D. Steedman, County Judge.

The appellant was convicted in the county court of Grayson county, Texas, under an indictment charging in substance in the first count that defendant committed an aggravated assault and battery upon the person of Jennie Hall, a female, the defendant then and there being an adult male person; the second count charging in substance that the defendant was a person of robust health and strength, and the said Jennie then and there being decrepit; and the third count charging, in substance, that defendant went into the house of a private family and there committed an assault and battery upon the said Jennie Hall.

The jury returned a verdict of guilty of aggravated assault against the defendant, and as punishment assessed against him a fine of twenty-five dollars.

Mrs. Jennie Hall was the first witness for the State. She testified that she was thirty-seven years old; that she was step-mother to the defendant, having been seven years married to his father. The defendant struck the witness twice, on the ninth day of September, 1883, in her family sitting room, in the house of her husband, situated in Grayson county, Texas. Witness did not know whether or not she struck the defendant. She struck at him with a chair because he was pushing her. Witness could not remember what the defendant said as he advanced into the room, except that he cursed her. Defendant, with his fist, struck the witness in the left eye, and then knocked her down. The witness's face swelled up and became discolored, and remained so for two or three weeks. The witness thought the defendant had reached the age of twenty-one years, and was a strong man. Witness had been in bed all day at the time, and had been sick off and on all summer.

Cross-examined, the witness stated that the room in which the difficulty took place was no more the defendant's room than it was the room of the other hired hands. The defendant's sec-

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ond blow knocked the witness flat on the floor. The blow did not break the chair. Witness never curses at any time. She had never threatened the defendant, and had never called him a son of a b—h. The sitting room in which the difficulty occurred opened into a hallway, and the stair ran down opposite the sitting room door. Witness's husband, E. C. Hall, had just come into the hall, and was standing inside of the door when the witness first saw him. This was before E. C. Hall interfered. The witness's daughter, Alice Stobin, was present and saw the whole of the difficulty, but did not strike the defendant. Witness assisted in placing supper on the table, but told Mr. Hall that she would not get a warm meal.

Alice Stobin testified, for the State, that she was the thirteen-year-old daughter of the prosecutrix, Jennie Hall, and was present when the difficulty occurred. While Mrs. Hall was in the sitting room, the defendant came down stairs, stopped at the sitting room door, and cursed Mrs. Hall. He then stepped into the room and struck Mrs. Hall twice, knocking her down with the first blow. Mrs. Hall first struck the defendant with a chair. Witness's step-father, E. C. Hall, then interfered and separated the parties.

Cross-examined, the witness stated that, during the fight between her mother and the defendant, she, the witness, struck the defendant. Witness's mother struck the first blow, with the chair, and then received two blows from the defendant, the first of which felled her to the floor. At the time that the difficulty commenced the belligerent parties were standing just inside the sitting room door. E. C. Hall rushed in to separate the combatants as soon as he could after Mrs. Hall struck the first blow. Mrs. Hall's face was discolored for two weeks after the difficulty. The witness went off to school two days after the difficulty and did not return home for three weeks. As soon as the difficulty was over, witness and the prosecutrix went to the house of Mr. Hughes, a neighbor. Mrs. Hall called the defendant a "trifling puppy," but nothing else. She did not curse him.

The defendant introduced his father, E. C. Hall, who testified in substance that he was seventy years of age, and had been married to the prosecutrix about six years. The defendant, at the time of this trial, was not quite twenty-one years old, and still lived at home with the witness. Witness was present at the time of the difficulty between his son, the defendant, and

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his wife. The witness, accompanied by the defendant, had been after medicine for his wife, who had been complaining during the day. They reached home about seven or eight o'clock, and witness asked his wife to prepare a little supper. She declined, and witness and defendant retired to the dining room to partake of a cold supper. While eating, the witness's wife, the prosecutrix, came into the dining room and proceeded to scold the witness. The witness talked back somewhat roughly. She then accused the defendant of telling witness tales on her, and called the defendant many ugly names. She then went up stairs and threw the defendant's trunk out of the window, and his satchel of clean clothes out at the north door. Witness then got mad himself, went up stairs and threw his wife's daughter's trunk out at the door.

Witness then got the defendant's satchel of clothing and put it on the stair steps, that he might take it up stairs. In the meantime the defendant had taken his trunk back up stairs. When he came down stairs for his satchel, he saw Mrs. Hall standing in the door, and said to her: "I don't want you to monkey with my things any more." Thereupon Mrs. Hall caught up a chair, ran up to the defendant, and struck him over the head. Witness had just entered the hall, and seeing his wife strike the defendant with the chair, ran in between them and told them to stop their row. Witness shoved his wife back into the room. The defendant was then about even with the sitting room door, or possibly a short distance inside the room. As soon as Mrs. Hall struck the defendant they both made a rush at each other, and it was at this time that the witness made his way between them. In the scramble to get at each other Mrs. Hall fell to the floor. She fell some four or five feet inside the sitting room. Each continued the effort to strike the other after the witness got between them. The witness did not know whether or not the defendant struck Mrs. Hall during the fracas. If so, the witness did not see him do so, and witness saw the whole of the fight. Mrs. Hall cursed and threatened the defendant, saying that she would kill, poison, or cut the defendant, or make him leave the house.

Being subjected to a cross-examination, this witness averred that he testified in this cause with the greatest reluctance. While the witness was doing his best to separate his wife and son and stop the fight, the girl, Alice Stober, was pounding the defendant's back with all the force of which she was capable.

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If the defendant struck Mrs. Hall during the fight, the witness saw nothing of the blow. Witness was somewhat excited, and it is possible that the defendant may have struck her without witness seeing it. Defendant did not curse Mrs. Hall in witness's hearing. He said nothing more to her than "I don't want you to monkey with my things any more." The witness stopped the difficulty as soon as he could. Mrs. Hall cursed the defendant, calling him, also, a "trifling puppy" and a "son of a b--h." She was very angry. Witness was very much excited and talked very loud in his efforts to separate the parties. The stairway ran down on the west side of the hall, and the sitting room was on the east side of the hall, the door being just opposite the foot of the stairway.

A new trial was asked because "the verdict is contrary to the law and the evidence."

*Cowles & Story, J. L. Cobb and J. P. Cox, for the appellant.*

*J. H. Burts, Assistant Attorney General, for the State.*

**WILLSON, JUDGE.** There are three counts in the indictment, each charging an aggravated assault and battery. First, that the defendant, an adult male, committed an assault and battery upon a female; second, that the defendant, a person of robust health and strength, committed an assault and battery upon a decrepit person; and third, that he went into the house of a private family and committed the assault and battery.

A general verdict of guilty of an aggravated assault was rendered upon this indictment, without specifying upon which of the three counts it was based. As to the first count, it is not sustained by, but is contrary to the evidence. An *adult* is a person who has attained the full age of twenty-one years. (*Schenault v. The State*, 10 Texas Ct. App., 410.) It was proved by the testimony of defendant's father positively that at the time of the trial the defendant was not twenty-one years old. There was no evidence contradicting, or tending to contradict this proof, except that of the alleged injured female, who testified that she *thought* the defendant was twenty-one years old. She did not state that she knew his age, nor does it appear that in testifying about it she had reference to the time of the alleged offense, or to the time of the trial. Besides, the mere opinion or belief of this witness cannot be regarded as evidence in con-

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tradition of the positive testimony of the defendant's father, who, it must be presumed, knew the age of his own son.

As to the second count, while the evidence might be held sufficient to establish the allegation that the defendant was a person of robust health and strength, it was not sufficient to prove that the alleged assaulted party was *decrepit*. She was not an *aged* person, being only thirty-seven years old. Mr. Webster defines "aged" as follows: "Old; having lived long; having lived almost the usual time allotted to that species of being." The usual allotted time for human beings to live, prescribed by revealed law, and in accord with the law of nature, is the period of three score years and ten. It is not alleged in the indictment, however, that the lady was an aged person, but that she was *decrepit*, and we must therefore direct our attention to this specific allegation.

What meaning are we to give the word *decrepit*? Words used in the Penal Code, except where specially defined by law, are to be taken and construed in the sense in which they are understood in common language, taking into consideration the context and subject matter relative to which they are employed. (Penal Code, Art. 10.) Mr. Webster makes the word "decrepit" a dependant of old age; that is, according to his definition, before a person can be *decrepit* old age must have supervened upon such person. He defines the word thus: "Broken down with age; wasted or worn by the infirmities of old age; being in the last stage of decay; weakened by age." This word is not defined in the Code, nor do we find any definition of it in the law lexicographies. In our opinion, as used in Article 496 of the Penal Code, and as commonly understood in this country, it has a more comprehensive signification than that given it by Mr. Webster. We understand a *decrepit* person to mean one who is disabled, incapable or incompetent, from either physical or mental weakness or defects, whether produced by age or other causes, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength. We think that, within the meaning of the word as used in the Code, a person may be *decrepit* without being *old*; otherwise the use of the word in the Code would be tautology. It certainly was intended by the Legislature that it should signify another state or condition of the person than that of old age. Thus, where the party assaulted was a man about fifty years old, disabled by rheumatism to such an

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extent that he was compelled to carry his arm in an unnatural position, and in such a manner as to render it almost if not entirely useless to him in a personal difficulty, it was held that, whilst his condition might not come technically within the meaning of the word *decrepit* as defined by Mr. Webster, yet it might with propriety be said that it fell in the measure of that word as used in common acceptance. (*Bowden v. The State*, 2 Texas Ct. App., 56.)

But, giving to this word its broadest meaning, we do not think that the proof in this case shows that the alleged injured person was *decrepit*. She testifies herself that she had been sick off and on during the summer, and that she had been in bed all day the day of the difficulty. It is not shown what was the character of her sickness, or what effect it had produced upon her. On the other hand, it was proved that on the evening of the difficulty, and at the time of its occurrence, she was up and going about the house; that just before she was assaulted by the defendant she had gone up stairs and thrown his trunk of clothes out of the house through a window, and had also thrown his satchel out of the house. It was further proved that before defendant struck or attempted to strike her she struck him with a chair. Considering all the testimony upon this question, we are of the opinion that it fails to show that the lady, at the time of the alleged assault upon her, was in a *decrepit* condition within the meaning of the law. Therefore the conviction cannot be sustained under the second count.

As to the third and last count, the learned judge, in his charge, did not submit the issues under it the jury. He instructed the jury as to the first and second counts only, saying nothing whatever as to the third. As this last count was not submitted to the jury, we must presume that the verdict was not based upon it, but upon one or the other, or both, of the preceding counts. We think the court very properly omitted to submit this third count to the jury, because, in our opinion, the evidence did not warrant its consideration. It was shown by the evidence that the alleged assault took place in the house of defendant's father, in the common sitting room of the family, and that the defendant at the time was an occupant of the house and a member of the family. We do not think that subdivision 3 of Article 496 of the Penal Code applies to such a case. We do not believe that it was intended to make an assault and battery aggravated when committed by a person in his own

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house. We think the object of this provision is to protect private families from the intrusion into their houses, and assaults made therein, by persons who are not members of the family, and who have no legal right to be upon the premises without the consent of the owner thereof.

We find in the record numerous bills of exceptions and assignments of error which we do not think it necessary to notice in this opinion. The questions presented are not of general importance, and are of a character that may, by proper investigation and effort on the part of the court and the counsel in the case, be avoided on another trial.

Because in our opinion the verdict of the jury is not supported by the evidence, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered April 16, 1884.

[No. 2939.]

## JOHN G. ASHLOCK v. THE STATE.

1. **THEFT EVIDENCE—VENUE.**—In a prosecution for the theft of a mare it was proved by the State that the animal was running in her accustomed range in C. county, and had been there for a week prior to the time she was seen in the defendant's possession in D. county. *Held*, sufficient to prove that, when taken, the animal was in C. county.
2. **SAME—PRACTICE.—LEADING QUESTIONS** are such as plainly suggest to the witness the answers sought to be elicited by the interrogator. "Did K. and R. tell you the day they saw the man in D.?" was not a leading question.
3. **SAME—HEARSAY EVIDENCE.**—The question as propounded called for and elicited hearsay testimony, but, in view of the fact that K. and R. testified as witnesses in the case, and stated in their testimony that they told the witness of whom the question was asked precisely what the said witness testified they told him, the admission of the answer to the said question is *held* not to be such error as to warrant the reversal of the conviction.
4. **SAME—EVIDENCE—PRIVILEGE OF COUNSEL.**—As tending to show bias, and for the purpose of enabling the jury to properly weigh the testimony of witnesses for the defense, it was proper to allow the State, on cross examination, to elicit from such witnesses the fact that they testi-

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fied before the grand jury in the same case, without being subpoenaed, and at the instance of the defendant; and in referring to the facts so elicited, in argument, the counsel for the State did not abuse his privilege.

5. **SAME.—CHARGES OF THE COURT** are not tested by the strict rules applicable to indictments. All that is required of a charge is that it shall present the law of the case substantially and correctly, in a way that the jury will understand, and not be confused and misled by it. The objection urged to the charge in this case is that it does not instruct the jury that, in order to constitute theft, the taking of the animal must have been fraudulent. The charge, without using the statutory word "fraudulent" as descriptive of the taking, instructs the jury that if the defendant "took the mare with the fraudulent intent to appropriate her," etc. *Held*, sufficient.
6. **SAME.—REASONABLE DOUBT.**—Upon the question of reasonable doubt the court charged the jury that if they had a reasonable doubt of the defendant's guilt, arising from the evidence in the case, they should acquit. *Held*, sufficient; and that the reasonable doubt is not required to be charged with reference to every, or any particular phase of the case.
7. **SAME.—CASE STATED.**—The defense was that the defendant honestly acquired possession of the alleged stolen animal, having won her at a game of cards from one H. The evidence was to the effect that K., the owner, turned the animal out on November 12. On the fourteenth day of the same month a witness saw said H. in possession of an animal suiting the description of the one stolen. After this the mare in question was seen on her range for a week or more. A defense witness testified that, a day or two before the defendant was found in possession of the animal in D. he saw the defendant win her from H. at a game of cards; that the mare was not then present, but H. said that she was running at large in a certain lane. Upon this state of evidence the court charged the jury: "If you believe from the evidence that the defendant won the mare in controversy from some person who claimed to be the owner of said animal, at a game of cards, and that he believed such person to be the owner, you will find the defendant not guilty, notwithstanding you may believe that such person was not in fact the owner of the mare." The court refused an additional charge to the effect that if defendant acquired possession of the mare in any way from H., who had stolen her, he would not be guilty of theft, though he may have known that H. stole her. *Held*, that the charge as given was sufficient; that though the principle invoked by the special charge is correct in the abstract, its refusal was not error in this case, in view of evidence which disclosed that even if H. had stolen the animal prior to that time, he had abandoned possession of her, and she was again on her range and in the constructive possession of her true owner. The doctrine applicable to this case is that, when subsequently taken from her range by the defendant, that act constituted another and distinct taking, and if such taking was fraudulent it was theft, although authorized by H. See the opinion *et seq. extenso* on the question.



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- d. SAME—POSSESSION OF RECENTLY STOLEN PROPERTY.—When relying upon the possession of recently stolen property, to convict, the State is required only to prove the falsity of the defendant's explanation made at the time his possession was challenged. The State cannot be required to disprove every conflicting explanation the defendant may make. See the opinion in illustration.

APPEAL from the District Court of Collin. Tried below before the Hon. R. Maltbie.

The indictment charged the appellant with the theft of a mare, the property of Allen Kelly, in Collin county, on the twelfth day of November, 1883. His trial resulted in a verdict of guilty, and his punishment was assessed at confinement in the penitentiary for the term of five years.

Sam Reynolds was the first witness for the State. He testified, in substance, that he was at a livery stable in the city of Dallas, on the twenty-second day of November, 1883. While the witness was there the defendant came up, riding a black horse and leading a bay mare. Some one asking the defendant if he wanted to trade the mare, witness's attention was directed to the animal, which he knew well. The defendant replied to the inquiry referred to, that he did not wish to trade, but that he would sell the animal. Witness then stopped defendant, examined the mare, and said to defendant: "I know this mare; you got her from Allen Kelly." Defendant replied: "No, I got her from Fox Smith." Witness replied: "I know Fox Smith," and asked defendant his name. Defendant answered: "John Ashlock." Witness replied to defendant: "I have often heard of you, but have never seen you before." Defendant then asked witness his name, and it being given him he said: "I have often heard of you but have never seen you before." The mare led by the defendant was of bay color, rather heavily built, and rather crestfallen in the shoulders, as though she had had the fistula. She was branded JCT, the two first letters connected, the stem of the T forming a script J. She also had a wart on the left pastern joint. In this conversation the defendant told the witness that Fox Smith had made a crop with the mare, and that he, the defendant, had had her in his pasture for the preceding three weeks.

The witness encountered the defendant again on the next morning, and learned from him that he had sold the mare. Some two or three weeks later Allen Kelly came to witness and

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asked him to go with him to McKinney to see about his mare. Witness and Kelly first went to Coleman's and told him that witness saw the animal in Dallas on November 22, preceding. Thence they went to the house of the defendant, reaching there about sundown. They proposed to the defendant to go with them to Fox Smith's and see about the manner in which he, defendant, acquired possession of the mare. Defendant then said that he did not get the mare from Fox Smith, but traded for her in the forks of Elm and Pecan creeks, and that there was a man living in McKinney who knew where he got the animal. Kelley and witness then proposed to him to go with them to McKinney and see Ganezer, the man to whom he sold the animal in Dallas. The defendant agreed, and after occupying about twenty minutes in saddling his horse, went with witness and Kelly. When they met Ganezer the defendant paid him back fifty dollars, the purchase money of the animal. She was well worth seventy-five or eighty dollars. While the parties named were in McKinney, a man named Hartin either came up or was sent for, and said that defendant traded for the mare in the forks of Elm and Pecan creeks. The defendant had made about the same statement during the evening.

Cross-examined, the witness stated that he was in the city of Dallas from the twenty-first to the twenty-fourth of November, 1883. He first saw the mare in the possession of the defendant on the twenty-second day of that month. On the twenty-third day of that month, which was the next day, the defendant brought the mare and the man Ganezer, to whom he had sold her, to where the witness was lodging, and told Ganezer that witness knew the mare and could tell him all about her. Witness told Ganezer what he knew of the animal in the presence of the defendant. Witness left Dallas on the succeeding Sunday morning, and at some distance out was overtaken by the defendant, and the two rode some miles together. In the conversation in McKinney, referred to above, the defendant said that the mare was not present when he traded for her in the forks of Elm and Pecan creeks, but that, to his knowledge at that time, she was running in Coleman's lane. From Coleman's place in Collin county to the city of Dallas, the distance is about thirty-five miles.

Allen Kelly, the second witness for the State, testified that he owned the stolen animal at the time of the theft, and described her as she was described by the witness Reynolds. As

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had long been his custom, the witness turned her out to graze on the evening of November 12, 1883. She did not, as usual, come up on the next morning. About two weeks later witness went to Dallas and learned that she was in the possession of one Ganezer, who had purchased her. A few days later than this, with Reynolds as company, witness went to see the defendant about her, and to get him to go with them to see Fox Smith. Defendant then said that he did not get her from Fox Smith, but traded for her at Yonkepin lake, in the forks of Elm and Pecan creeks.

Fox Smith testified, for the State, that he had known the defendant all his life in Collin county, where he had always lived. The witness had never traded him a bay mare. He had never heard the defendant's honesty questioned.

J. T. Coleman testified, for the State, that he had known the defendant since his childhood. A lane runs between the houses of the witness and the defendant's father, which are situated about a mile apart. Witness remembered the time Kelly lost his mare. He had seen a bay mare in the lane near his house, bearing the brand described by the witnesses Kelly and Reynolds. She had also a white foot on the left leg, a flesh mark not mentioned by the other witnesses named. This mare was one that the witness had owned and given to his son some eighteen months before. The witness saw her almost daily for six or seven days, the last time on the Tuesday or Wednesday before she was seen in Dallas. On one Saturday evening Kelly and Reynolds came to the witness's house and told him that on the twenty-second or twenty-third of November the mare was seen in Dallas. Kelly and Reynolds left the witness's house to go to Ashlock's. Witness never saw the mare in the defendant's possession. She at one time ran with the horses of defendant's father. Defendant lived about two miles east of witness.

Bord. Coleman, the son of the last witness, testified, for the State, that he saw a mare answering to the description given of that alleged to have been stolen by the defendant, in the lane near his father's house, several times. He first saw her there on Tuesday, November 14, 1883. She remained in that neighborhood until the Wednesday of the following week. He last saw the mare in the lane near his father's house on the twentieth day of November, 1883.

Sheriff Williams Warden testified, for the State, that the de-

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defendant, with Kelly and Reynolds, came to his office in McKinney at night about the first of December, 1883. In answer to questions the defendant said that he traded for the mare he was charged with stealing on Yonkepin lake, in the forks of Little Elm and Pecan creeks; that the mare was not present at the time he made the trade. A man named Hartin, being sent for by defendant, came to the office and said that defendant got the mare at Yonkepin lake. Witness had never had process for Hartin. At this point the State closed.

Charles Hart was the first witness for the defense. He testified that he was, and had been a resident of Denton county for seven or eight years. He was a farmer by occupation. About the middle of November, 1883, the witness was in and about the forks of Elm and Pecan creeks on a cow hunt. He came upon the defendant and a man named Hubble, sitting down on the ground on the banks of Yonkepin lake, playing cards. Defendant attempted to hide something under his leg, as the witness rode up. Witness saw that the article was a deck of playing cards. After some talk witness asked if either of the parties had seen a certain cow. A little later Hubble asked witness if, in his rounds, he saw anything of a bay mare with brands and flesh marks as described by the witnesses. Witness answered that he had not. The parties then played one or two games of cards in the presence of the witness. On one of these Hubble staked the mare against the defendant's horse. Defendant won the game, and the mare. Witness left the parties within a few minutes and saw nothing more of either of them until about one month before this trial, when defendant came to him in the town of Denton and asked him if he remembered the occasion of his winning the mare from Hubble at Yonkepin lake. Witness replied that he did.

On cross-examination, the witness stated that Hubble was a young man, about twenty-six years of age, rather above average height, measuring perhaps six feet, wearing neither whiskers nor mustache. Witness did not remember the color of his hair, eyes or clothes. The defendant's horse was of a black or brownish color. The witness could not describe Yonkepin lake, further than that it was surrounded by timber and cleared spaces. The witness was examined before the grand jury, testifying then as he testifies now. Witness was not summoned before the grand jury. He paid his own expenses, but expects to recover his fees; if not, he expects the defendant to reimburse

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him. The game played by Hubble and defendant was seven up. Witness was in no way related to the defendant.

C. C. Davis testified, for the defendant, that he resided in Collin county with his brother-in-law, Barn Hill. He was visiting in Denton county on November 10, 1883, and returned home between the twelfth and fourteenth of that month. When near Lloyd, a post office in Denton county, about thirteen miles from his home, the witness met up with a man riding a heavy set bay mare, answering in brands and flesh marks that alleged to have been stolen by defendant. This man, whose name witness did not then learn, stopped at Lloyd. A short time later the witness met this man at Meredy Sullivan's, and then learned that his name was Hubble.

Cross-examined, the witness testified that Hubble was a heavy set man, twenty-three or twenty-four years old, freckled faced and red complexioned. When at Sullivan's he was dressed in black clothes, and rode a very small bay horse pony. Previous to seeing Hubble riding the mare, the witness had seen the animal in Coleman's lane. It was this circumstance that engaged his notice when he saw the animal in Hubble's possession. Hubble did not dismount at Sullivan's. He wore no hair on his face. Witness was in no way related to the defendant.

Z. B. Warrick testified, for the defendant, that he had seen the man J. B. Hubble, who threshed wheat at Meredy Sullivan's place during the year 1883. Sometime in December of that year the witness and defendant went on a stock hunt to Little Elm, in Denton county, a mile or two distant from Lloyd's. On the edge of Denton county they met Hubble. Defendant told Hubble that Kelly claimed and had proved and taken the mare which he, defendant, had got from him, Hubble, and defendant then and there demanded a bill of sale from Hubble. Hubble drew away, looking somewhat confused and uneasy, and said that he would execute the bill of sale. Thence the three went to the house of Hubble's mother, where Hubble executed the bill of sale, signing it with a lead pencil that made a blue mark. Here the bill of sale was read in evidence.

Cross-examined, the witness testified that Hubble was of moderate size and light complexion. When the parties reached Mrs. Hubble's house, defendant and Hubble went to a table and did some writing there. Witness did not know whether the bill of sale was then written, or whether defendant had previously prepared it. It, however, was signed at that time by Hubble,

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and defendant wrote witness's name to it as a witness. The witness could not write himself. Witness did not hear defendant say anything to Hubble about being a witness. Witness and defendant were out hunting stock two days. Passed one night at Hart's farm. Witness was not related to the defendant. He went before the grand jury at the instance of the defendant, without process of any kind, paying his own expenses, which he expects the defendant to reimburse, if he should fail to get his fees.

M. Ashlock, the defendant's father, testified in his behalf that in the fall of 1883, the defendant had authority from him to trade or sell any of his horse stock running on Elm creek or the "Flats." Defendant had often traded horse stock. He owned four horses in his own right at the time he obtained the mare he is charged to have stolen. Defendant has a house of his own, a wife and two children.

A. L. Echhart testified, for the defense, that he had known the defendant for eight years, and had never heard his honesty questioned before he was accused of this theft. Joe Wyrick, witness's brother-in-law, and the defendant came to witness's house in Denton county one night in December, 1883, and remained there until morning, when defendant, Wyrick and witness went to the town of Denton. Witness saw the witness Hart in Denton on that day. Witness was before the grand jury, at the defendant's instance, without process, at his own expense, in which he expected to be reimbursed either by the State in fees, or by the defendant.

G. T. Thomas, the defendant's attorney, testified for the State, in rebuttal, that he inquired for Hubble but could not find him. He understood that he had left the country, and had no process issued for him.

The motion for new trial presented the question involved in the opinion.

*Abernathy Bros. and G. F. Thomas, for the appellant.*

*J. H. Burts, Assistant Attorney General, for the State.*

WILLSON, JUDGE. 1. It was sufficiently proved that the offense was committed in Collin county, the county of the prosecution. The stolen mare was running in her old range, where she had been raised, in Collin county, and had been there for a

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week prior to the time she was seen in defendant's possession in Dallas county. This was sufficient to prove that when taken she was taken in Collin county.

2. Witness Coleman was asked: "Did Kelly and Reynolds tell you the day the mare was seen in Dallas?" This question was objected to by defendant because it was leading, and because it sought to elicit testimony which would be mere hearsay. The objections were overruled, and the witness stated that Kelly and Reynolds told him that the mare was seen in Dallas on the twenty-second or twenty-third of November, 1882. We do not think the question in its form was a leading one. It is not every question which may be answered "yes" or "no" that is a leading question. A leading question is one which puts into the mouth of the witness the words to be echoed back, or plainly suggests the answer which the party propounding it wishes to get from him. This question did not suggest any answer, but merely led the mind of the witness to the subject of inquiry, which is permissible even in an examination in chief. That it called for hearsay testimony, and did in fact elicit such testimony, is true, and a strict enforcement of the rules of evidence would exclude the answer of the witness. But we do not think the admission of the witness's answer, in view of the facts of this case, such error as would authorize a reversal of the judgment. It appears from the record that Kelly and Reynolds testified in the case, and they stated in their testimony that they had told the witness Coleman precisely what he testified they had told him, thus supplying and superceding the hearsay statement objected to. Besides, the statement of Coleman as to what Kelly and Reynolds told him could have no appreciable bearing upon any issue in the case, and was therefore wholly immaterial when considered in connection with the testimony of Kelly and Reynolds. (*Gose v. The State*, 6 Texas Ct. App., 121; *Reynolds v. The State*, 8 Texas Ct. App., 412.)

3. We think the district attorney had the right, on the cross-examination of defendant's witnesses, to elicit from them that they had testified before the grand jury in this same case, and had done so without being subpoenaed, and at the instance of defendant, etc. This was allowable for the purpose of showing the bias of the witnesses in favor of the defendant, and to enable the jury to properly weigh the testimony of said witnesses. (*Stevens v. The State*, 7 Texas Ct. App., 39.) We think, further, that the district attorney in his argument to the jury

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did not infringe upon the rules in referring to the facts thus elicited, and we perceive nothing to condemn in his remarks so far as they are set forth in the record. He stated nothing but what had been proved before the jury, and the record does not show, as contended by appellant's counsel, that he argued to the jury that, because the grand jury had found the bill of indictment, having the testimony of defendant's witnesses before them, therefore the trial jury should also disregard the testimony of these witnesses and convict.

4. It is objected to the charge of the court that, in stating the elements of the offense of theft, it does not instruct the jury that the *taking* must have been *fraudulent*. The charge instructs the jury that "if the defendant took the mare with the *fraudulent* intent to appropriate her," etc., and does not use the statutory word "fraudulent" as descriptive of the *taking*. Were this objection made to an indictment thus describing the offense, it would be well made. (*Muldrew v. The State*, 12 Texas Ct. App., 617.) But we are not to test a charge by the strict rules applicable to an indictment. All that can be reasonably required in a charge is that it should present the law of the case substantially and correctly, in a way that the jury will understand, and not be confused or misled by it. In the charge under consideration, the jury were told that if the defendant took the mare with the fraudulent intent to appropriate her to his own use and deprive the owner of the value thereof, such taking would be theft. While this would not be sufficient in an indictment, we certainly think it is sufficiently accurate in a charge. If the intent to appropriate the property and deprive the owner of the value of it was a fraudulent one, and existed at the time of the taking, then the taking could not have been otherwise than fraudulent, and the jury could not possibly have been misled as to the law of the case by the omission in the charge to qualify the taking by the word "fraudulent." There was no exception taken at the trial to this portion of the charge, and while in our opinion it would have been more perfect if it had qualified the taking by the use of the word *fraudulent*, still this error, if it be an error, was not calculated to prejudice the rights of the defendant, and is therefore not of a character to affect the judgment.

5. In answer to the objections made to the charge of the court upon the rule governing circumstantial evidence, it is sufficient to say that it was substantially correct and was not ex-



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cepted to; and we cannot see that the defendant has been prejudiced thereby.

6. By the charge the jury were instructed that, if they had a reasonable doubt of the defendant's guilt, arising from the evidence in the case, they should acquit him. This was sufficient. It was not required that this instruction should be given with reference to every or any particular phase of the case. (*McCall v. The State*, 14 Texas Ct. App., 353.) There was no error, therefore, in refusing the special charge requested by defendant.

7. The defense relied upon was that defendant came into the possession of the mare in good faith; that he won her at card playing from one Hubble. It appear from the evidence that Kelly, the owner of the mare, turned her out on the range November 12. On the fourteenth day of the same month one of defendant's witnesses testified that he saw a man whom he afterwards learned was named Hubble, in possession of a mare suiting the description of the animal stolen. After this Kelly's mare was seen at Coleman's, her old range, and was observed there for a week or more. On the twenty-second or twenty-third of November, defendant had possession of her and sold her in Dallas. It was testified to by one of defendant's witnesses that, a day or so before defendant was seen with the mare in Dallas, he, witness, was present in the woods at Yonkepin lake, between the forks of Elm and Pecan creeks, and saw defendant win the mare at card playing from one Hubble; that the mare was not present at the time, but that Hubble said she was running at large in Coleman's lane, and that defendant bet his horse against the mare and won her.

Upon this state of evidence the court charged the jury as follows: "If you believe from the evidence that the defendant won the mare in controversy from some person who claimed to be the owner of said animal, at a game of cards, and that he believed such person to be the owner, you will find the defendant not guilty, notwithstanding you may believe that such person was not in fact the owner of the mare." It is insisted that under the facts of this case the court should have further charged that if defendant acquired possession of the mare in any way from Hubble, who had stolen her, that he, defendant, would not be guilty of the theft, although he might have known that the animal was stolen property. In a proper case such a further charge would be correct, but, with reference to the facts of this case, it was not, in our opinion, demanded, and

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would not have been applicable. The mare was not in the possession of Hubble when defendant won her. She was in her accustomed range and in the constructive possession of her owner. Defendant did not acquire possession of her from Hubble. If Hubble had, prior to that time, stolen her, he had turned her loose, abandoned possession of her, and she was no longer a stolen animal, but was in the legal possession again of her true owner. This being the case, the prior theft of the mare by Hubble cannot be availed of as a defense. When the mare was subsequently taken from her range, the taking constituted another and distinct taking, and if the act was fraudulent it was theft, although authorized by Hubble. That is, if Hubble had stolen the mare and then turned her loose, so that she was again in the possession of her owner, and defendant had, while the mare was thus in possession of the owner, purchased or won her from Hubble, and then took her, such taking would be theft, if fraudulent and with a knowledge on the part of defendant that Hubble did not own her; because he did not acquire possession of the property from Hubble, but took it from the possession of the owner. We think the charge of the court upon this branch of the case went as far as the facts demanded it should, and that it was as favorable to defendant as it should have been.

8. When defendant had the mare in Dallas he was asked by a witness who knew her, from whom he had obtained her? and he answered, from Fox Smith. It was admitted afterwards by defendant, and also conclusively proved on the trial, that this statement was false. Subsequently, when pressed more closely upon the subject, he stated that he had bought the animal of a stranger, in the fork of Elm and Pecan creeks. It is contended by his counsel that this was a reasonable explanation of his possession, and that it devolved upon the State to show the falsity of it. Conceding that it was a reasonable explanation, we do not think the State was called upon to disprove it. When defendant's possession was first challenged, he said he got the mare from Fox Smith. This statement the State proved to be false. This was all the law required the State to do. It would be unreasonable, and not the law, to require the State to disprove every explanation which a defendant might give, however reasonable, of his possession of stolen property. This requirement extends no farther than to the explanation given when his possession is for the first time questioned.

## Syllabus.

Other questions are raised in the record than those we have noticed, but in our judgment they are unimportant, and do not require discussion. We have found no such error in the record as in our opinion would warrant a reversal of the judgment, and it is therefore affirmed.

*Affirmed.*

Opinion delivered April 16, 1884.

[No. 2959.]

## JOHN HOUSE v. THE STATE.

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31	213.
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36	124
36	128
37	623

1. **THEFT—PRACTICE—EVIDENCE.**—It is a well settled rule of practice that, "when necessary to establish identity in developing the *res gesta*, or in making out the guilt of the accused by circumstances connected with the theft, or to explain the intent with which the accused acted with respect to the property for the theft of which he is on trial, it is competent for the State to prove that other property was stolen at or about the same time and in the same neighborhood from which the property in question was stolen; and that this other property was found in the possession of the defendant when arrested for the theft of the property for which he is on trial. Under such state of case, however, it is the duty of the court to explain, in the charge to the jury, the purpose of such proof." See the opinion for evidence admissible under this rule.
2. **SAME—ACCOMPLICE TESTIMONY—CHARGE OF THE COURT.**—The State has the right, in a prosecution for cattle theft, to prove that the defendant illegally altered the brands on the cattle. Where, then, it appears that a witness knew that the defendant illegally altered the brands, and with this knowledge and the further knowledge that a third party claimed the cattle through the defendant, he assisted the said third party to drive the said cattle to market, such evidence is sufficient to raise the question of the witness's complicity. Under such a state of facts, the court charged the law of accomplice as follows: "An accomplice is one who, knowing the unlawful intent of another, aids him in the commission of the theft. If the jury find that the witness H. was an accomplice in the theft, provided a theft was committed as charged, then the jury could not convict the defendant on his testimony alone, and unless it be corroborated in some material matter tending to connect the defendant with the theft," etc. This charge was excepted to, in the motion for new trial, upon the ground that the court erred in setting out and defining the law of accomplice testimony, in limiting the question of accompliceship to the connection of the witness with the commission of

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the theft. *Held*, that the objection was well taken; that the charge should have submitted the question of *particeps criminis* in its full import, whether with regard to the original theft or to any subsequent connection with the stolen property; and that the error is of such character as to operate to the prejudice of the defendant, and is therefore cause for reversal.

APPEAL from the District Court of Gonzales. Tried below before the Hon. Everett Lewis.

The conviction in this case was for the theft, in Gonzales county, Texas, on the fifteenth day of January, 1883, of one head of neat cattle, the property of A. S. Billings. A term of three years in the penitentiary was the penalty assessed by the jury.

A. S. Billings was the first witness for the State. He testified that he recovered his yearling in June, 1883. Witness had last seen the animal in January previous. It was then branded SIDS. When recovered it was branded BIDS. The witness identified the animal by flesh marks and the brand. It was a red and white speckled steer yearling, whiter about the hips than on any other part of the body. Its tail had been bobbed or the brush cut off when recovered. Mrs. Wheat had turned the animal out of her pen in the fall, and witness last saw it on its accustomed range in January. Witness had at no time consented that any one should take it. This animal ran with its mother in Gonzales county, and when last seen was following her. The mother was a cow belonging to the witness, but which had been milked by a neighbor, Mrs. M. A. Wheat. The range of the cow and yearling was near Lee Duren's, on Sandies creek, about two miles from the witness's place. The defendant lived about twelve miles from the witness's house. The witness's mark had also been changed.

The BIDS brand was the only one on the yearling when it was recovered. From appearances, the witness surmised that the brand was changed in the spring. The defendant once penned stock at witness's place, and witness's cattle, branded SIDS, were around the pen at the time. The defendant lives in either Karnes or DeWitt county, near the line between the two counties. The cow and yearling were turned out in the fall, and the latter was still sucking when last seen in January. The first S was the only part of the brand that had been changed, and I had been added after the last S. The IDS was part of the

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old brand, and had not been run over. The letter S. showed plainly under the B. The brand as changed had peeled, but had not "haired over." The witness, Lee Collins, and Fitz Henry, examined the brand in the court house yard. When witness roped the yearling, it was perfectly gentle and came up to witness. The witness found the mother of this animal with her bunch in March. The yearling was not then with her. Witness's cattle had never ranged outside of Gonzales county, so far as he knew.

The Gonzales county record book of brands was then introduced, and showed that the brand SIDS was recorded in the name of the witness Billings, on March 2, 1880. His mark, as recorded, was a crop and underbit in the left and overslope in the right ear.

John Mills was the next witness for the State. He testified that in March or April, 1883, he saw about twenty-five head of cattle, freshly branded with a circle J in Trammel's pasture. This brand, on some animals small and on other animals large, was over old brands, and was put there evidently to hide or cover the old brands. This brand the witness had known as that of the defendant. A bob-tailed yearling, branded BIDS, was among the twenty-five head in Trammel's pasture. These cattle were taken in charge by officers about one month after the witness saw them. While the officers were taking the cattle in charge, the defendant and Wade and Charles Kennedy came up, and defendant and Wade Kennedy were arrested. The B in the brand named was the only letter run over, and the terminal I was added. The old brand showed plainly under the new. The circle J brand was not then on the yearling. It takes a brand from three to four weeks to peel off.

The witness thought that the pasture was in charge of Phil Trammell. It was on the old Trammel place on Sandies creek, near Leesville. The defendant lived about twenty miles distant from this pasture, in a southerly direction. Witness and C. L. Frisbee, both deputy sheriffs, went to Trammel's pasture together, to look at the cattle. They saw the cattle no more until June, when they took charge of them, and arrested the defendant and Henry Trammel. The testimony of deputy sheriff Frisbee was substantially the same as that of this witness.

Sheriff D. C. Price testified, for the State, that he had some yearlings in the court house yard for a time that were sent in

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by deputy sheriff Frisbee. A. S. Billings claimed and got one of them. Witness knew nothing about the brands.

Henry Trammel next testified for the State. According to his statement he bought, in the early part of April, 1883, twenty-three head of yearlings from John House, the defendant. He bought them in DeWitt county, and drove them to Gonzales county. The cattle were in Powell's small pasture near defendant's house when witness bought them, and were gathered by witness in that pasture. Jesse Haldeman, a witness in this case, assisted the witness to drive these cattle to Gonzales county. The defendant did not, though he accompanied the witness from Powell's pasture to the road, about a quarter of a mile, where he turned back. Among these twenty-three head of cattle purchased by the witness from the defendant, was a bob-tailed yearling branded BIDS. This brand was fresh, showed to be a clean brand, and was just peeling when witness bought the animal. The brand was not changed after witness got the animal. Witness took no further notice of the brand. The yearling in question was in the witness's pasture when the crowd came there in June. The witness had since seen that animal in the court house yard in the town of Gonzales. The State then proved by this witness that he was under five or six indictments for cattle theft, in connection with these same cattle. If the brand on the yearling had been run over, that fact, he said, could not be detected.

R. J. Kennedy testified that Henry Trammel and Jesse Haldeman penned some cattle in his pen one night, and took them off early next morning. Sometime after this, the defendant, John House, came to the witness's house and said to witness: "I understand that Henry Trammel is about to get into trouble about some cattle I let him have. I will go up there and get them and turn them loose on the prairie at home, and then I will like to see anybody get them." This occurred on the day that defendant was arrested at Trammel's pasture.

Jesse Haldeman, the next witness for the State, testified that the defendant and Henry Trammel came to him, and the latter hired him to assist in driving a bunch of cattle to Gonzales county. The defendant said that Trammel would pay the witness well for the service, and that he would see that payment was promptly made. The bunch of cattle numbered twenty-two or twenty-three head. Some of the brands were blotched, and some were run into old brands. Three of these animals the

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witness sold to the defendant. Two of these three, the defendant mavericked, and let House (Trammel?) have. Witness and Trammel put these cattle in Trammel's pasture. The witness did not see the alleged stolen animal in that herd, and knew nothing about it. He never saw that animal in his life, and had never seen the BIDS I brand. The defendant, while in the Cuero jail sometime before this trial, told the witness that he would be willing to pay witness fifty dollars not to testify against him in this case. The defendant accompanied witness and Trammel with the cattle about seven miles, to a point about a quarter of a mile past Mrs. Tennell's place, in the direction of Trammel's pasture. The witness did not, on the trial of this case in Cuero, testify that House, the defendant, did not go into Gonzales county with witness, Trammel and the cattle.

The witness left home in April, and went to Wilson county. He remained at his brother-in-law's house, near Stockdale, in that county, until June, when he went to a place above Austin. Thence he went to Bob Still's place, in Bandera county, where he remained until September, when he returned to his home about a quarter of a mile from defendant's house. The witness did not, in discussing the troubles of the defendant and Trammel, tell Archie Mims that the authorities had got the wrong men; that he, the witness, got the cattle, sold them, and received the money for them. These cattle were driven from DeWitt on the eighteenth day of April, 1883, by Henry Trammel and the witness. Witness himself made arrangements to turn State's evidence in the House cases, and never spoke to the officials about this case. Witness told the defendant, when he was changing the brands on these cattle, that we would be caught. The defendant replied that he would not be caught; that "these men had stolen these cattle, and that he would get away with them, d—n them." Witness roped some of the cattle for the defendant.

John Duderstadt testified, for the State, that Mrs. Tennell lived one and a half or two miles inside of Gonzales county. County commissioner Wright was of opinion that Mrs. Tennell lived in DeWitt county, near the line of Gonzales county.

J. Y. Stamps, for the defense, testified that the defendant came to his hotel in Harwood in April, 1883, left his horse at the stable, and took the train for San Antonio. He was gone two, three or four days, returning on an evening train. Another witness for the defense, Mr. H. S. Parker, testified that the de-

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defendant, *en route* to San Antonio, took supper at his, witness's, house in Gonzales county, on the evening of the fourteenth or fifteenth of April, 1883. From witness's house defendant went direct to Harwood.

Archie Mims was the next witness for the defendant. He testified that, in the latter part of July or the early part of August, 1883, in Bandera county, Jesse Haldeman told him that he, Haldeman, got the animals about which House and Trammel were in trouble, and that he had the money for them, and that the authorities had arrested the wrong men.

Two witnesses located Powell's pasture in DeWitt county, three miles from the Gonzales county line, and Mrs. Tennell's place five miles from Powell's and in Gonzales county, one and a half or two miles from the DeWitt county line.

W. L. Davidson testified, for the defendant, that on a former trial of defendant in Cuero, the witness Jesse Haldeman testified that the defendant did not, when these cattle were driven into Gonzales county, go with him and Trammel into Gonzales county.

The defense recalled the witness Jesse Haldeman in order to examine him and lay a predicate to impeach his testimony. The question was asked him: "Did you not, in the first week in June, in Wilson county, Texas, after J. D. Wade told you of House's troubles, tell the said Wade that you would have to leave the country; that if you were caught you would be caught running; that you got the cattle and that John House did not?" The witness promptly replied in the negative. He was then asked: "Did you not, on the day you returned from Trammel's pasture, stop at R. J. Kennedy's, and go from that point to Smiley's lake with Brassell Kennedy, and did you not there have a conversation with Brassell Kennedy about the cattle you and Trammel drove to Trammel's pasture, and did you not tell the said Kennedy that you got the money for most of those cattle, and that John House had but very little interest in them and got but little in the matter?" The witness Haldeman answered that he went to Smiley's lake with Brassell Kennedy, and got drunk at Smiley's, where he talked a great deal. He did not know what he said, but knew that he made no such statement to said Kennedy as was imputed to him. The defense then proposed to introduce the said Wade and Kennedy to contradict the witness, but was not permitted by the court to do so. The defense then proposed, but was not allowed, to prove by R. Schnei



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der that said Schneider bought the yearling from Haldeman, left it with other cattle of his, Schneider's, in charge of defendant.

The motion for rehearing includes the questions involved in the opinion.

*Fly & Davidson* filed able briefs for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

HURT, JUDGE. At the last Galveston term of this court we affirmed the judgment in this case without a written opinion. Appellant at that term made a motion for rehearing, which was submitted and transferred to this branch.

We will discuss but two of the grounds presented; first, that which relates to the admission of certain evidence over the objections of defendant; and second, the charge of the court with reference to what constitutes a witness an accomplice.

It appears from the record that Henry Trammel bought twenty-three yearlings from John House, in DeWitt county, and that these yearlings were driven to Gonzales county and placed in Trammel's pasture. Among and with this bunch of cattle was the yearling charged to have been stolen by defendant. And it further appears that the witness Haldeman let House have three of the yearlings, and assisted Trammel in driving the twenty-three head to Gonzales county. By Haldeman the State proved, over objections of defendant, that defendant changed the brands on these cattle. The objection is that the testimony fails to identify the cattle upon which the brands were changed, Haldeman swearing positively that the yearling in dispute was never seen by him at any time "in his life." It is, however, stated by Trammel that this yearling was in the bunch of the twenty-three head, and that Haldeman assisted him in driving them to Gonzales county.

A fact is admissible because of other facts in the record, and this rule is not affected by a conflict in the evidence contradictory of the existence of the fact. The jury may have believed Trammel, and if so, the yearling was with and constituted one of the twenty-three head received by Trammel at Powell's, and driven by him and Haldeman to Gonzales county, and there placed in Trammel's pasture.

Under these circumstances, had the State the right to prove

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by Haldeman that the brands on some of these cattle—the cattle received by Trammel from defendant at the same time the yearling in dispute was received—were fraudulently altered?

We are of the opinion that this was competent and admissible evidence under the principles enunciated in the following rule. “When necessary to establish identity in developing the *res gestæ*, or in making out the guilt of the accused by circumstances connected with the theft, or to explain the intent with which the accused acted with respect to the property for the theft of which he was being tried, it was competent for the State to prove that other property was stolen at or about the same time and in the same neighborhood from which the property in question was stolen, and that this other property was found in possession of the defendant when arrested for the theft of the property for which he was on trial. The purpose of such proof, however, must be explained in the charge of the court.”

If the State had the right to prove that the defendant altered the brands on these cattle—and we hold that it had—Haldeman knew that defendant had fraudulently altered these brands, and with this knowledge assisted Trammel, with the further knowledge that he claimed through defendant, to drive them from DeWitt county to Gonzales county. In this we find evidence tending to show that Haldeman was an accomplice. This fact impressed itself on the learned judge presiding, and upon this subject he gave the following charge to the jury: “An accomplice is one who, knowing the unlawful intent of another, aids him in the commission of the theft. If the jury find that the witness Haldeman was an accomplice in the theft, provided a theft was committed as charged, then the jury could not convict the defendant on his testimony alone, and unless it be corroborated in some material matter tending to connect the defendant with the theft,” etc.

To this charge the defendant excepted in his motion for new trial, upon the following ground: “The court erred in setting out and defining the law of accomplices when used as witnesses in the trial of a cause, in limiting the question of accompliceship to the connection of the witness with the commission of the theft. The charge should have submitted the question of *particeps criminis* in its full import, whether with the original theft or any after connection with the stolen property.”

This objection to the charge is unquestionably well taken, and

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we would remark that when this point passed under examination at Galveston, our view of the record bearing upon this subject led us to believe that Haldeman was an accomplice by reason of the fact that he participated in the *taking* of the yearling. In other words, that the evidence tended to show that he was an accomplice, and that he became so by aiding in the *taking* as well as in driving the yearling; and that consequently there was no injury to defendant. In this, however, we find that we were mistaken, and hence the error in the charge assumes a very serious character, it being doubtful whether Haldeman took, or aided in the taking, and there being no doubt of his guilty connection with the yearling after the theft, if Trammel is worthy of belief.

"Accomplice" has a broader signification as used in Article 731 of the Code of Criminal Procedure than it has as used in Article 79 of the Penal Code. In the former it includes principal and accessory—in fact, all guilty participants, whether principals, accomplices or accessories. (*Williams et al. v. The State*, 42 Texas, 392; *Jones v. The State*, 3 Texas Ct. App., 575; *Davis v. The State*, 2 Texas Ct. App., 588; *Kelly et al. v. The State*, 1 Texas Ct. App., 628; *Irvin v. The State*, 1 Texas Ct. App., 301; *Roach v. The State*, 4 Texas Ct. App., 46; *Miller v. The State*, 4 Texas Ct. App., 251; *Barrara v. The State*, 42 Texas, 260.)

We are of the opinion that the error here complained of was of such importance as was calculated to injure the rights of defendant, and that the judgment must be reversed.

We cannot refrain from noticing the condition of this record—that which relates to the facts of the case. Confusion and uncertainty abound in regard to matters which could have been made clear and certain. A few instances will suffice. Haldeman swore that the brands were altered. How altered? In what brand were the cattle before they were altered? And into what brand did the alteration place them? When did the alteration take place? Did the brands, after the alteration, correspond with those on the cattle when seen by the other witnesses in Trammel's pasture? Twenty-five or thirty head of cattle were seen in Trammel's pasture, branded in defendant's brand. What description of cattle? Trammel bought of defendant twenty-three head of yearlings. Were those seen in his pasture in defendant's brand yearlings? We could point out other facts

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left in obscurity which could have been placed beyond cavil, but these instances will answer our purpose.

We have examined each assignment made by defendant closely, but do not find such error as will require a reversal of the judgment, except the error in the charge of the court, above noticed. The ruling of the court in regard to the right of defendant to introduce certain witnesses will not, under the circumstances, be revised. The facts proposed to be proved by those witnesses, however, were very clearly admissible.

For the error in the charge of the court, above indicated, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered April 19, 1884.

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[No. 2094.]

BENT. ELAM v. THE STATE

1. PRACTICE IN THE COURT OF APPEALS—CHARGE OF THE COURT.—In previous decisions of this court the doctrine has been advanced that convictions would not be set aside because of errors or omissions in the charge not sought to be corrected by exception or special charge, nor by being made ground of motion for new trial, unless the error was fundamental. Such doctrine, however, is not altogether correct. The true rule in such state of case is this: If there was a material misdirection of law as applicable to the case, or a failure to give in charge to the jury the law which was required by the evidence in the case, and such error or omission was calculated, under all the circumstances of the case, to prejudice the rights of the defendant, this court should, for either cause, reverse the judgment.
2. SAME—EVIDENCE.—The application of the rule stated, in all cases wherein it can be invoked, is controlled absolutely by the character of the evidence adduced on the trial. Whether or not it tends sufficiently to the establishment of a defense, or a mitigation of the offense, as to reasonably demand a charge, is a question primarily committed to the sound discretion of the court below, and then to this court on appeal. If its force is deemed very weak, trivial, light, and its application remote, the court should not charge upon it. If, however, it is so pertinent and forcible that it might, in reason, be expected to influence the jury in reaching a verdict, the court should so charge as to furnish them with the appropriate rule of law upon the subject. Note in this case the

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defense set up, and evidence *held* not to be of such a character as to demand a charge, in the absence of exception or requested instruction.

3. **THEFT—FACT CASE.**—See evidence *held* sufficient to sustain a conviction for horse theft.

**APPEAL** from the District Court of Dallas. Tried below before the Hon. G. N. Aldredge.

The conviction was for the theft of a horse, the property of Clark Kendall, in Dallas county, on the third day of May, 1881. The penalty imposed by a verdict of guilty was a term of five years in the penitentiary.

Clark Kendall was the first witness for the State. He testified that in April and May, 1881, he was the owner of a certain bay mare, branded 12 on the left shoulder, which was his brand. In the fall of that year he found his mare in the possession of Charles C. Williams. The witness had never consented that the said Williams or any one else should take the said mare, nor had he ever sold that mare to any one. When witness found the mare in the possession of Williams he learned for the first time that the defendant had traded her to Mr. Williams. Witness made the necessary proof and recovered her. This was in the fall of 1881. Prior to her loss the witness had ridden the animal about the poor farm, where he was a guard. It is true that during the fall of 1880 and the winter of 1881, the witness was addicted to strong drink, and frequently drank to excess. He often got on "big sprees" in Dallas, and sometimes would stay on them for weeks. He had often been arrested and confined in calaboose for drunkenness. However, he never failed to remember everything he did while drunk. The witness did not sell two horses, nor the mare charged to have been stolen, in Underwoods's saloon, on Main street, in Dallas, in the latter part of December, 1880, or in January or February, 1881. He never at any time in Underwood's saloon sold this animal to defendant, in the presence of Bob Pearson, Jim Hunnicutt, H. H. Dickey and J. J. Pratt. No conversation involving the sale of this animal ever occurred between witness and the defendant at that time and place, or any other time and place. Witness had never sold or authorized the defendant to take up and use the mare, or in any way to interfere with his possession of the animal. The witness was much confined to his bed by serious illness during the spring and summer of 1881, and for that

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reason did not learn of Williams's possession of the mare under purchase from the defendant. As soon as the witness recovered and learned that his mare was in the possession of Williams, he made the necessary affidavit of ownership. Williams thereupon notified defendant that witness claimed the animal. The defendant took no steps whatever to protect Williams's claim under his purchase, and Williams then surrendered the mare to the witness. The defendant interposed no objection at this time, and set up no claim, but on the contrary, when witness recovered possession of the mare, the defendant offered to purchase her from witness for forty dollars.

Charles C. Williams was the next witness for the State. He testified that he acquired possession of the animal described in the indictment by trade with the defendant on or about the third day of May, 1881. He gave the defendant another horse for her. She was branded with the figure 12 on the left shoulder and the left hip. The defendant told the witness at the time of that trade that the mare was his, that he had raised her on the range with Mrs. Hunnicutt's horses, and that the 12 brand was his. The witness did not remember the exact date of the trade, but it was sometime in the spring of 1881. Clark Kendall afterwards claimed the mare as his property, and proved his title to her, and in the fall the witness surrendered her to the said Kendall. Witness notified the defendant of Kendall's claim and recovery, and defendant said that he would make it all right with the witness, and went to Dallas next day ostensibly to see Clark Kendall about the matter. The defendant, after this trade, traded off the horse he got from witness in exchange for the mare, and had never fully paid the witness for his horse. The trade between the witness and the defendant was made in the daytime, and at the defendant's house. Witness and defendant drove the mare up from the range in Dallas county, in company with two of witness's horses which had strayed off, and which had been posted by the defendant. It was one of these recovered estrays that witness traded to defendant for the mare. No one but witness and defendant were present when this trade was made. Defendant had kept the mare hitherto openly, and with no concealment, so far as the witness knew. The witness was positive that, at the time of the trade, the defendant told him that the 12 brand was his. The witness was on Mesquit creek on the day of the trade, before it was made. He there met the defendant and learned that he had posted two of his,

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witness's, horses. Witness went with him home, and the trade was then made as above stated. After Kendall claimed the mare, and witness called on defendant about the matter, the defendant did not deny Kendall's title. At this point the State closed.

Bob Pearson was the first witness introduced by the defendant. He testified that late one evening in January or February, 1881, the defendant, J. J. Pratt, Jim Hunnicutt and his brother, old man Dickey, Clark Kendall and others, were in Underwood's saloon, on Main street, in the city of Dallas, where the defendant was keeping bar, and was then on watch. Clark Kendall was on a spree, but was not at the time very drunk. He had been on that spree and about that saloon for several weeks. The defendant and Kendall, on the occasion referred to, got to talking about horses. Kendall said to defendant: "Bent., let me sell you the two ponies." Defendant replied: "I have no use for them, and moreover I haven't the money to buy them." Kendall said in reply: "You can buy them without the money; go and get them, and in the spring pay me what such stock is worth." He may have said: "Pay me what you get for them." The defendant then called for pen, ink and paper to write bills of sale. Witness then said: "I have no ink. I have a pencil, but a bill of sale written with a pencil is not good." Pratt then spoke up and said: "A bill of sale is unnecessary when you have witnesses." The witness did not know who was the first to broach the subject of a trade. The witness was in no way related to the defendant, and had no interest in the result of this trial. He did not know to whom he had talked about this case. He had talked to E. G. Bower. This was just before he went upon the witness stand. The witness could not remember the names of all the parties in the saloon at the time of the trade, but remembered the two Hunnicuts, Pratt, Dickey, the defendant and Kendall. He knew that the defendant had been engaged in stock and cattle trading for a number of years. He had seen defendant make other trades for stock. He knew of no reason why he remembered the particulars of this trade.

Jim Hunnicutt was the next witness for the defendant. He testified that he was present in Underwood's saloon at the time of the trade between defendant and Kendall, and he gave in detail the same account of that transaction as that given by the witness Pearson. Witness's brother was not in the saloon at that time. Dickey and Pratt were. Witness was in no way re-

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lated to the defendant, and had no interest in the issue of this trial. Witness was related to certain persons who were relatives of the defendant. Witness had told no one that he saw the trade until the day of this trial. He knew of no reason why he particularly remembered this trade. He knew that the defendant, at the time, was a trader in stock, and knew of other stock trades he had made. Kendall may have had a drink or two on that occasion, but was not drunk.

H. H. Dickey testified, for the defense, that at one time he was a member of the police force of the city of Dallas. He was passing Underwood's saloon sometime in the winter of 1881, and saw the defendant and Clark Kendall in that saloon. They were then talking about a horse trade. Witness knew nothing particular about the trade, but heard something said about a bill of sale. He then left. Kendall and defendant were both drinking. Kendall at no time told the witness that he had sold the ponies to the defendant.

Henry Waller testified that he was at present, and was in 1880 and 1881, a member of the police force of the city of Dallas. He knew both the defendant and Clark Kendall. He had several times arrested Kendall for drunkenness. Kendall was very wild when on a spree, and would shout and make much noise. When drunk it was impossible to keep him from yelling. When on a big drunk Kendall would lose all control over his mind, and would know nothing that he would do. He used to drink very hard.

Pat Mullen testified that he was a policeman. He had often arrested Clark Kendall for drunkenness and confined him in jail. Kendall used to get on very hard drunks, and when in that condition he would know nothing of what, during the time, he would do, and when sobered could remember very little of anything that transpired during his spree.

The motion for new trial, setting up various grounds not considered in the opinion, was overruled, and notice of this appeal entered.

*H. Barkedale and E. G. Bower, for the appellant.*

*J. H. Burts, Assistant Attorney General, for the State.*

HURT, JUDGE. Two grounds are relied on for a reversal of this judgment. 1. That the charge of the court to the jury is



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not sufficiently full, there being a feature of the case presented by evidence to which the law was not applied. 2. That the verdict of the jury is against the weight of the evidence, and that therefore the court below should have granted a new trial.

Counsel for defendant concede that the charge of the court, to the full extent to which it goes, is without objection; the only complaint being that it did not extend to and apply the law to a certain phase of the case, which has support in evidence. There was no objection urged to the charge as given; no instruction was requested of the court, nor was any complaint made of the charge in the motion for new trial. This being the case, the writer, prior to the argument of counsel for the defendant in this case, entertained the opinion, and may have expressed it in former opinions, that for this court to revise a charge, the error therein must be fundamental. In this view we were wrong, owing to a misapprehension of the opinion in the case of *Bishop v. The State*, 43 Texas, 309. This subject being most thoroughly reviewed and discussed in the argument of counsel for the appellant, we are now convinced that, though no objection was made to the charge at the time, nor instruction requested which, if given, would have made the charge full and complete, covering each and every phase of the case required by the evidence; and though there was no complaint in the motion for new trial that the charge was not full and complete, and although the omission or error therein was not fundamental, still this court has the power to revise the charge, and under certain circumstances will reverse the judgment.

The error not being complained of at any time or stage of the trial below, by what rule is this court to be governed in determining whether such error will warrant the reversal of the judgment?

The rule we believe to be this: If there be a material misdirection of the law as applicable to the case, or a failure to give in charge to the jury the law which was required by evidence in the case, and the affirmative error, or the omission, is calculated, under all the circumstances of the case, to injure the rights of the defendant, this court should, for either of these errors, reverse the judgment.

But in all such cases as this—a case in which there was no complaint of the charge below—this vital question presents itself: Does the evidence, or any evidence in the case, tend

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sufficiently strongly to the establishment of the defense as to require a charge applicable thereto? Upon this subject Chief Justice Roberts, in *Bishop v. The State*, 43 Texas, 390, says: "When the evidence tends sufficiently to the establishment of a defense, or mitigation of the offense charged, as to reasonably require a charge as applicable, is a question of sound judgment to be exercised by the district judge in the first instance, and by this court on appeal. If its force is deemed to be very weak, trivial, light, and its application remote, the court is not required to give a charge upon it. If, on the other hand, it is so pertinent and forcible as that it might be reasonably supposed that the jury could be influenced by it in arriving at their verdict, the court should charge so as to furnish them with the appropriate rule of law upon the subject."

It will be seen from this that a failure to charge the law applicable to a defense will not necessarily result in a reversal of the judgment. There may be evidence tending to present a certain defense, and yet its force may be so "weak, trivial, light, and its application so remote" that a failure to charge upon it will not require a reversal of the judgment. On the other hand, if the evidence tending to present such defense is so "pertinent and forcible" as that it might be reasonably supposed that the jury could be influenced by it, the law applicable to such defense should be applied, and a failure to do so would require a reversal of the judgment; for the extent of the injury to the defendant resulting from a failure to charge the law, or whether defendant be at all injured by such failure, depends upon the pertinency and force of the evidence to raise the defense. If the evidence be pertinent and sufficiently strong for it to reasonably appear to this court that the jury may have acted thereon and acquitted the defendant, if the law applicable to the case had been given in the charge to the jury, the injury referred to would appear from the record, and this court would reverse.

If, however, this evidence be so "weak, trivial, light, and its application so remote" as not to render it reasonable to suppose that the jury would, if the law applicable thereto had been charged, be influenced thereby, clearly this court would not reverse the judgment.

The question upon which this appeal must turn, therefore, is this: Is there a defense presented by evidence which is sufficiently pertinent and strong "as that it might be reasonably

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supposed that the jury could be influenced by it in arriving at their verdict," in regard to which the court below failed to apply the law? In determining this question we would remark that all of the facts in the case, whether bearing upon the defense in regard to which the omission in the charge is alleged or not, must be looked to.

In relation to what matter, or defense, in this case did the court fail to apply the law? This requires a statement, and that of the appellant will be adopted. It is: "Appellant's defense was that he had purchased the horse alleged to have been stolen by him, of the owner, and had authority to sell or dispose of the horse. The court charged the jury that if they believed from the evidence the owner sold the horse to appellant, or had a reasonable doubt on the question, they should acquit."

It is insisted that this charge is not sufficiently full, in that it fails to apply the law to the following phase of the case, to wit: That though Kendall, the owner, did not sell the horse to defendant, yet if he, defendant, honestly and in good faith believed that there was a sale, and in pursuance of this belief took the horse from the range and disposed of the same, he would be guilty of no offense. The facts relied upon by the defendant by which this defense is presented are contained in the statement above and the following: "The testimony shows that the owner of said horse was an habitual drunkard; that by the excessive use of whiskey his mind had become impaired and his memory very defective; that just previous to the alleged sale of the horse he had been on a long drunken spree and debauch, and was then and had been suffering with paralysis."

Now, as we have stated above, there is no complaint of the charge because of misdirection of the jury, but because the court failed to apply the law to all the different phases of the case, or the different state of facts under which, if believed by the jury, they would have probably acquitted defendant. And it must be borne in mind that there is no objection to the charge of the court relating to the purchase, so far as it went. The objection is that the jury may have believed from the evidence that the transaction sworn to by defendant's witnesses actually occurred, and still in law there was no sale because of the mental imbecility of Kendall, arising from the excessive use of whiskey; and that therefore the court should have charged the jury that, though they may not believe from the evidence that Kendall was capable of making a contract, yet, if defendant

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believed him capable, and, acting upon this belief, purchased, and, in pursuance of the purchase and belief, took and disposed of the horse, he would not be guilty. This is a correct proposition, and, if presented by evidence which is pertinent and sufficiently strong as to reasonably suppose that the jury could be influenced by it in arriving at their verdict, the court should have charged so as to furnish them with the appropriate rule of law upon the subject.

The question, therefore, is, what evidence in this record presents this issue? The testimony of defendant's witnesses rather tends to negative than to raise this defense—the witnesses to the sale. Pearson says Clark Kendall was on a spree, but was not very drunk at the time. Hunnicut states that Kendall was not drunk the day he made the trade with defendant, although he may have had a drink or two. Dickey says that Kendall and defendant were both drinking. These witnesses, Pearson, Hunnicut and Dickey, depose to the trade or sale, and certainly it will not be contended that the evidence tends to raise the issue as to the mental imbecility of Kendall. That he was drinking may be conceded, but evidently from their evidence Kendall was competent mentally to make a binding contract. There was nothing in his conduct, or in what he said at the time, tending in the slightest degree to question his capacity to contract.

It is true that Waller and Mullen state that when on a spree, like other men similarly situated, Kendall did not know what he was doing, and could not remember what had occurred while in this condition. This evidence, it may be conceded, tends to raise the presumption that this was his condition when the sale was made, but the question arises, with what force does it thus tend? Has it that pertinency and force which would render it reasonable to infer that the jury would have been influenced by it in arriving at their verdict, if the law applicable thereto had been given in charge? We are of the opinion that it has not. On the other hand, we believe that notwithstanding there is evidence tending to present this defense, still its pertinency and force are so remote and weak that a failure to charge the law applicable to this defense worked no injury to the rights of defendant. We are not to be understood as holding that if the omission complained of had been excepted to at the time, or sought to be cured by the proper charge, that this court would not reverse.

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The second ground relied upon for a reversal is that the verdict is against the weight of the evidence. We will not discuss the question so ably argued by counsel for defendant in regard to the right of this court to reverse a judgment because the verdict is against the weight of the evidence, for we are of opinion the verdict in this case is amply supported, not only by the evidence but by the great preponderance of the evidence. What are the facts? That defendant took from the range the mare of Kendall and sold her to Charles Williams. This mare was plainly branded 12; when he sold her to Williams defendant "told him that the 12 was his brand, and that he had raised the mare." It is not contended that this was true, but it is conceded to be false. If, then, Williams swore the truth, defendant, at a time when an honest man ought to tell the truth, was guilty of a deliberate falsehood. How, we ask, does this conduct—this falsehood uttered at such a time—comport with the fact that he had purchased the mare from Kendall, the legal owner? If in fact this transaction actually occurred, what necessity for this deliberate falsehood? The truth would have served the same purpose, and if Williams had been unwilling to rely upon Elam's statements, Pearson, Hunnicut and Dickey could have established his right to the mare.

How terribly cogent this conduct under the circumstances of this case! But stranger, if possible, than this fact, is the fact that when Kendall claimed the mare Williams notified Elam of the fact, and he stated that he would make it all right, and went to Dallas to see Kendall, but as stated by Williams, "Elam did not deny Kendall's title to the mare in question, which I bought from him, after Kendall made the affidavit claiming her." Here again, under the most pressing circumstances, strange to say no allusion whatever was made by defendant to the purchase from Kendall. These facts were all before the jury, and by the charge they were called on to say whether or not the defendant purchased the mare from Kendall, and having determined this issue against the defendant, we will not disturb their finding.

We have found no such error in this record as will justify this court in disturbing the judgment, and it is therefore affirmed.

*Affirmed.*

Opinion delivered April 19, 1884.

## Syllabus.

[No. 3018.]

W. D. SHORT ET AL. v. THE STATE.

## ON MOTION TO DISMISS APPEAL.

**SCIRE FACIAS — PRACTICE — CASE STATED.**—S. was bailed to appear before a justice's court of C. county, upon a charge of wilfully burning a public bridge. Failing to make his appearance, forfeiture of the bond was taken, and judgment *nisi* was entered, and upon hearing was made final. From this judgment S. and his sureties appealed to the county court, the appeal bond being signed by all the parties against whom judgment was rendered in justice's court, and by three other parties as sureties on the appeal bond. Judgment in the county court was rendered against the same parties to the judgment in the justice's court, but no judgment was taken against the three parties who signed the appeal bond as sureties. The same parties to the appeal to the county court appeal from that court to this, with the same parties as sureties on their appeal bond to this court, who were sureties on their appeal bond to the county court. The State's motion to dismiss the appeal to this court is based upon the following grounds: 1. Because there is no final judgment in the county court from which this appeal will lie. 2. Because the sureties on the appeal bond to the county court were not disposed of by the judgment of the county court. 3, 4 and 5. Because the sureties on the appeal bond to this court, being parties to the suit, because of being sureties on the appeal bond to the county court, are not competent sureties to the appeal bond to this court; and hence the appeal bond to this court is without sureties. *Held*, that, in order to authorize this appeal, it was not necessary that the final judgment should have disposed of the sureties on the appeal bond from the justice's to the county court; that, no judgment having been rendered against the sureties on the appeal bond to the county court, they were competent sureties on the appeal bond to this court.

## ON THE MERITS.

1. **SCIRE FACIAS—PRACTICE—PLEADING—BURDEN OF PROOF.**—The effect of a general denial is to put in issue all the material, issuable allegations of the plaintiff's petition. In a proceeding upon a forfeited bail bond, the citation serves the purpose of a petition, and a general denial pleaded to it puts in issue all the allegations constituting the State's cause of action, and casts upon the State the burden of proving such allegations. This being a *scire facias* case, and the general denial being pleaded, the trial court erred in holding that the case involved no question of fact.
2. **SAME.—RIGHT OF TRIAL BY JURY** is, by section 15 of the Bill of Rights, declared to be inviolate. Any party to a civil suit is entitled to a trial

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by jury, upon complying with the requirements of law; while in criminal cases, save in specially excepted cases (Code of Criminal Procedure, Article 594), the only mode of trial upon an issue of fact is by jury. Proceedings in forfeited bail cases, after judgment *nisi* and the issuance of citation, are the same as in civil cases, except where otherwise provided by statute; and upon the question of trial by jury in such cases, the rules applicable to civil cases will apply. The appellants in this case having complied with the law entitling them to a jury, the court below erred in withholding the right.

2. **SAME—BAIL.**—A peace officer making an arrest for a felony by virtue of the warrant of a magistrate, has no right to take bail, but must take the accused before the proper magistrate named in the writ. The warrant in this case charged a felony, and bail was accepted by the officer who made the arrest. *Held*, that the motion to quash the bail bond should have prevailed.

**APPEAL** from the County Court of Collin. Tried below before the Hon. T. C. Goodner, County Judge.

The appeal in this case was from the final judgment upon the forfeiture of the appearance bond of Joseph Short, bailed in the sum of seven hundred and fifty dollars upon the charge of wilfully and maliciously burning a public bridge over East Fork creek, in said Collin county. The opinions disclose the questions which arose upon the trial in the trial court and this court.

*J. S. Jenkins, G. F. Thomas and W. M. Abernathy*, for the appellants.

*J. H. Burts*, Assistant Attorney General, for the State, moved to dismiss the appeal for reasons shown in the first opinion delivered by this court.

**HURT, JUDGE.** W. D. Short, by the name of Joe Short, entered into a bond to secure his appearance before justice Beverly, of Collin county, in the sum of seven hundred and fifty dollars, with William Short, W. C. Stanford, T. W. Garrett, J. H. Smith and E. D. McWilliams as his sureties, to answer the charge of wilfully burning a public bridge. Short failing to appear as required by his bond, forfeiture was taken and judgment *nisi* entered, which upon final trial was made absolute and final. From this judgment Short and his sureties appealed to the county court, the appeal bond being signed by all the parties

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Opinion of the court.

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against whom judgment was entered in the justice's court, and as sureties this appeal bond is signed by T. C. DeSpain, I. V. Stark and J. S. Jenkins.

A trial in the county court resulted in a judgment against the same parties against whom judgment was rendered in the justice's court. There was no judgment taken against DeSpain, Stark and Jenkins, or either of them, the sureties on the appeal bond to the county court.

The same parties who appealed from the justice's to the county court, appeal from the county court to this court, with DeSpain, Stark and Jenkins as sureties, being the same parties who were sureties on the appeal bond from the justice's to the county court.

The Assistant Attorney General moves to dismiss the appeal: 1. Because there is no final judgment in the county court from which an appeal will lie. 2. The sureties on the appeal bond from the justice's to the county court were not disposed of by the judgment of the county court. 3, 4 and 5. The pretended sureties on the appeal bond to this court, being parties to the suit, by reason of their being sureties on the appeal bond from the justice's to the county court, are not legal and proper sureties, and therefore there are no sureties on the appeal bond to this court.

First ground: Was it necessary to make the judgment final a judgment from which an appeal would lie, to enter judgment against, or in some legal manner dispose of, the sureties on the appeal bond from the justice's to the county court? We are of the opinion that it was not.

Third, fourth and fifth grounds: No judgment being entered against these sureties, were they rendered incompetent sureties on the appeal bond to this court by reason of the fact that they were sureties on the appeal bond from the justice's to the county court? We are of the opinion that they were not. The motion to dismiss the appeal is therefore overruled.

*Motion overruled.*

[REPORTERS' NOTE.—At a subsequent day of the term the case was disposed of upon its merits in the following opinion.]

WILLSON, JUDGE. 1. It is well settled that the effect of a general denial is to put in issue all the material issuable allegations in the plaintiff's petition. (W. & W. Con. Rep., secs. 816, 817.)



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Opinion of the court.

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In a proceeding upon a forfeited bail bond, the citation serves the purpose of a petition. A general denial pleaded to it puts in issue all the allegations constituting the State's cause of action, and casts upon the State the burden of proving such allegations. (*Houston v. The State*, 13 Texas Ct. App., 560; *Goodin v. The State*, 14 Texas Ct. App., 443.) It is manifest, therefore, that the court erred in holding that no issue of fact had been presented in this case, the general denial having been pleaded.

2. "The right of trial by jury shall remain inviolate." (Bill of Rights, section 15; Rev. Stats., Art. 3059.) Any party to a civil suit is entitled to a trial by jury, upon complying with the requirements of the law. (Rev. Stats., Art. 3061.) In criminal cases, the only mode of trial upon an issue of fact is by jury, unless in cases specially excepted. (Code Crim. Proc., Art. 594.) Proceedings in forfeited bail cases *after* judgment *nisi* and the issuance of citation, are the same as in civil causes, except where otherwise specially provided by statute. (*Hart v. The State*, 13 Texas Ct. App., 555.) Trial by jury in such cases would therefore be governed by the rules applicable to such trials in civil causes. In the case before us, appellants having complied with the law entitling them to a trial by jury, it was error to withhold from them that right, and for this error the judgment would be reversed, if in all other respects it was correct.

3. When a sheriff or other peace officer arrests a person under a warrant issued by a magistrate upon a charge of *felony*, it is the duty of such sheriff or peace officer to take such person forthwith before the magistrate who issued the warrant, or before the magistrate named in the warrant. (Code Crim. Proc., Art. 247.) No authority is given by law to the sheriff or peace officer in such cases to take bail. That authority is vested in the magistrate. (Code Crim. Proc., Art. 259 *et seq.*; *Busby v. The State*, 13 Texas, 136; *State v. Miller*, 31 Texas, 564; *Kiser et al. v. The State*, 14 Texas Ct. App., 201.) In *Patillo v. The State*, 9 Texas Court of Appeals, 456, there is an intimation that a peace officer having a warrant of arrest may in all cases which are bailable take bail, and Articles 285 and 296 of the Code of Criminal Procedure are cited as authority. In that case the accused had been arrested upon a *capias*, and hence the question there was a very different one than that presented in this case.

We are of opinion that where all the provisions of the law bearing upon this question are considered and construed to-

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Statement of the case.

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gether, it must be held that a peace officer, under a warrant of arrest for a felony, has no authority to take bail, but must forthwith take the accused before the proper magistrate. It was error, therefore, to overrule appellant's motion to quash the bail bond, the said bond being a nullity because taken without authority of law.

The judgment is reversed and the cause is dismissed.

*Reversed and dismissed.*

Opinion delivered April 23, 1884.

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[No. 2950.]

MEER FONDREN v. THE STATE.

**AGGRAVATED ASSAULT—INTENT—EVIDENCE.**—In every assault there must be an intent to injure coupled with an act which must at least be the beginning of the attempt to injure at once, and not a mere act of preparation for some contemplated injury that may afterwards be inflicted. See evidence held to be insufficient to support a conviction for aggravated assault, because insufficient to prove an assault.

**APPEAL** from the County Court of Ellis. Tried below before the Hon. O. E. Dunlap, County Judge.

The conviction was for an aggravated assault upon one Fayette Miller, with a gun. The offense was alleged to have been committed in Ellis county on the fifteenth day of January, 1883. A fine of fifty dollars was the penalty imposed.

Fayette Miller was the first witness for the State. He testified, in substance, that some time in January, 1883, he was at the defendant's gin, in Ellis county, Texas. Mr. M. Halford came to the gin house, and said to the defendant: "I have come for one of those bales of cotton, and I intend to have it. Right is right, and right wrongs no man." Halford then went out of the gin house and began to load the cotton on the wagon. Defendant followed, pushed Halford back, threw the cotton off, and said: "Don't you take that cotton." Halford struck the defendant, and the two fell to the ground, Halford on top. Halford struck defendant several blows, then got up, walked off a short

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Statement of the case.

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distance, picked up a stick, and told defendant that he would drop the stick when defendant put up his knife. Defendant put up his knife and started toward the gin, when Halford said to him: "You have made your brags about marking and splitting ears, but you can't do me that way." Defendant returned and he and Halford engaged in another fight. When the defendant came back this time witness could not say whether Halford was or was not rolling the bale of cotton. Soon after this the defendant's wife came upon the scene of action. She took hold of the lines and attempted to lead the horses away from the bale of cotton, when Halford went around, took hold of the horses, and told Mrs. Fondren not to meddle with the horses. The defendant then went around the wagon and said to Halford: "If you strike my wife I will cut your guts out." Halford thereupon backed off and secured a club about three feet long and two inches in diameter. Defendant then said: "If I cannot protect my property without it, I will go and get my gun." Accordingly he went to the house, about two hundred yards distant, and returned with his gun on his shoulder. When he reached a point about fifty yards distant from the party, he took his gun from his shoulder, and throwing it across his arm said: "Clear the track."

Witness, then being apprehensive of serious trouble, met the defendant and asked him "not to shoot the boy," telling him at the same time that Halford had consented to let the cotton alone. The defendant told the witness to "get out of the way," that "this is not your fight," and walked around witness. The witness followed after him. The witness at this time did not have his knife out. Webb then came out of the gin with a stick and told the witness to hold up; that two on one was too many. Witness then took out his knife and told Webb to stand back, that he, witness, was trying to put a stop to the row. Webb then called to defendant that witness had a knife. Defendant turned, drew his gun on witness, and told witness to put up his knife or he would shoot the witness. Witness put up his knife, and the defendant put up his gun. When witness left Halford to meet the defendant, Mrs. Fondren was standing near and talking to Halford, and she was standing in the same place when witness returned. Several children, including one of the defendant's, were standing around. About this time everything quieted down. Defendant did not frighten the witness when he drew his gun on him.

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Statement of the case.

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J. J. Daniels was the next witness for the State. His account of the difficulty was the same as that of the witness Fayette Miller, up to the time that the defendant went to the house and returned with his gun. Proceeding with his testimony, he stated that when the defendant got within forty or fifty yards of the crowd he pointed his gun toward the crowd and said: "Look out! I am going to shoot." Miller then walked up to defendant and told him that he should not shoot the boy. Defendant told Miller to go off, that it was none of his fight, and passed around Miller and up to where Halford and Mrs. Fondren were. Webb at this time came up with a club and stopped Miller. Miller drew his knife and told Webb to stand back. Webb replied that two on one was unfair. Miller retorted that he was only trying to stop the row. During this time Webb called to defendant that Miller had a knife. Defendant turned on Miller, covered him with his gun, and told him to put up his knife or he would shoot. Miller put up his knife and defendant put up his gun.

M. L. Halford, the next witness for the State, testified, in substance, that he rented land from his uncle, the defendant, in 1882, and under the contract was to give him one-half of the cotton crop grown on it. Witness had gathered and sold three bales of the cotton. In October or November of that year witness quit the crop, but soon after returned and agreed with defendant to resume work and carry out his contract, and to pick what remained of the cotton before he got any more of it for himself. He had not picked all of the cotton remaining at the time he went for the bale which was the subject matter of this difficulty. There remained, perhaps, some six hundred pounds of unpicked cotton in the field. When the witness went to put this bale in his wagon the defendant pushed the witness off, threw the cotton out of the wagon, and told witness to let the cotton alone. In pushing the witness off he scratched the witness's hand. The two clinched, fell to the ground, the witness on top, and the witness struck defendant several blows. Defendant then drew his knife and attempted to cut witness. Witness got up, walked off and got a stick, and told defendant to put up his knife. The defendant did so, and started back to the gin, when witness said: "You have made your brags about marking and turning loose, but you cannot serve me so." Witness at that time was trying to get the cotton back on the

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Opinion of the court.

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wagon. Defendant picked up a stick and started back toward the witness, and another little fight ensued.

About this time Mrs. Fondren, the defendant's wife, came up, took hold of the lines, and attempted to lead the horses off. Witness told her to go away; that she was not concerned in that controversy. The defendant stepped up with his knife out and told witness not to strike his wife, unless he wanted to be cut open. Witness stepped off a short distance, picked up a stick, and told defendant to put up his knife. Defendant replied: "If I cannot protect my property any other way I will do it with my gun," and went to the house to get his gun. Witness sat down on a bale of cotton, and Mrs. Fondren came to him and opened up a conversation. The remainder of this witness's statement was essentially the same as that of the witnesses Miller and Daniels.

The statements of two other witnesses, one for the State and one for the defense, were substantially the same as those of the foregoing witnesses.

Mrs. Fondren, for the defense, was the last witness to take the stand. She did not see the beginning of the difficulty, and her first appearance upon the scene was when she attempted to lead the horses from the cotton. In preventing her from doing this, Halford caught her by an arm and pressed it so tight that for several days the print of his fingers was on her arm. From this time to the culmination of the affair her account harmonized with that of the others, except that, according to her statement, when Miller went to intercept the defendant, on the latter's return from the house with the gun, he, Miller, drew his knife, held it with the blade up his coat sleeve, and thus armed approached the defendant, and in the same manner followed him back to the crowd. The defendant at no time attempted to shoot Miller.

The motion for new trial raised the question involved in the opinion, and denounced the punishment imposed by the verdict as excessive.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** We are of the opinion that the evidence does not sustain the conviction. Miller was advancing toward

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Opinion of the court.

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defendant, armed with an open knife, when defendant was told of it, and instantly turned and pointed his gun at him, telling him if he did not put up his knife he would shoot him. Miller put up his knife and the defendant put down his gun. At the time these acts occurred defendant and another person, who was present, were angry at each other, and had just before been engaged in fighting each other, and defendant had gone off and got his gun and returned, with the avowed purpose of protecting his property from being taken by the person with whom he had been fighting. He had had no difficulty with Miller, and there is no evidence that he had any ill feeling or malice toward him. While defendant was in an excited state of mind from his difficulty with the other party, and had his attention directed to that party, he was informed that Miller, who was in his rear, was armed with a knife, and, looking around, he discovered that such was the fact, and that Miller was advancing upon him. With a foe in front and another in the rear, as he doubtless supposed, he very naturally made the necessary preparations to defend himself. He made no attempt to shoot Miller or any one else, but merely stood upon the defensive. It does not appear that his intention was to injure Miller or any one else, unless he was forced to do so in defense of his person or his property. On the contrary, it is shown that when he saw he was no longer in danger he put down his gun and made no further hostile demonstration.

In every assault there must be an intention to injure, coupled with an act which must at least be the beginning of the attempt to injure at once, and not a mere act of preparation for some contemplated injury that may afterwards be inflicted. (Clark's Crim. Law, p. 159, note 70.)

We think the evidence in this case fails to show any act committed by the defendant which, in law, would constitute an assault upon Miller; and because the verdict is not warranted by the proof, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered April 23, 1884.

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Opinion of the court.

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[No. 2062.]

J. T. MULKEY AND IKE RUSSELL v. THE STATE.

16	54
28	448

"LOCAL OPTION" LAW—REPEAL.—Since the appeal in this case was perfected, the voters of the precinct in which, at the time of the trial, the "Local Option" law was in force, have determined against prohibition, and such fact has been proclaimed in the manner prescribed by law. Under such circumstances the judgment must be reversed and the prosecution dismissed, because there is no longer any law in force by authority of which the judgment can be enforced.

APPEAL from the County Court of Collin. Tried below before the Hon. T. C. Goodner, County Judge.

The conviction was for the violation of the "Local Option" law. A fine of twenty-five dollars was assessed as punishment.

*Garnett & Muse*, for the appellants.

*J. H. Burts*, Assistant Attorney General, for the State.

WILLSON, JUDGE. Appellants appeal from a conviction obtained against them in May, 1883, upon a charge of violating the "Local Option" law in precinct number four, of Collin county.

Since the conviction, in September, 1883, the voters of that precinct, at an election held in accordance with law, determined against prohibition in said precinct, and in accordance with such determination the commissioners' court of said county declared in due form that the provisions of the Local Option law were no longer in force in said precinct.

Such being the present condition of this case, the judgment must be reversed and the prosecution dismissed, because there is no longer any law in force by authority of which the judgment could be enforced. (*Freeze and Jones v. The State*, 14 Texas Ct. App., 31; *Prather v. The State*, Id., 453.)

*Reversed and dismissed.*

Opinion delivered April 26, 1884.

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Statement of the case.

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[No. 3045.]

J. W. BROCKMAN *v.* THE STATE.

1. **PURCHASING CATTLE WITHOUT TAKING A BILL OF SALE—EVIDENCE.**—In a prosecution for purchasing cattle without taking a bill of sale, the defendant proposed to prove that another person, to whom he gave money for the purpose, purchased the cattle for him, received them for him, and gave him a bill of sale which he said at the time was the bill of sale to the said cattle. He also offered in evidence the bill of sale. This evidence was excluded as irrelevant. *Held*, error; that, if defendant did in fact purchase the cattle through an agent, and the cattle were delivered to the agent in the absence of the defendant, he was entitled to such proof, which would constitute a good defense, unless it further appeared that he consented to the receiving of the cattle by his agent without a bill of sale. See the opinion on the question.
2. **SAME—VENUE.**—The venue of the offense of purchasing and receiving cattle without taking a bill of sale, is the county in which the cattle were purchased. There is no evidence of any character that the cattle in this instance were purchased, as alleged, in Karnes county. *Held*, fatal to the conviction.

APPEAL from the District Court of Karnes. Tried below before the Hon. H. C. Pleasants.

The indictment charged that the appellant, in the county of Karnes, on the third day of January, 1882, purchased three head of cattle from Emil Zuehl, without taking a bill of sale for the same. The trial resulted in the appellant's conviction, and his punishment was assessed at a fine of twenty dollars per head for three head of cattle so purchased. The motion for new trial, embracing, among others, the questions considered in the opinion, was overruled and this appeal prosecuted.

Emil Zuehl was the first witness introduced by the State. He testified that he was a resident of Wilson county, Texas. Witness and his father owned about one hundred head of cattle. The witness owned the ZIL brand. In the fall of 1881, because of the scarcity of water in his neighborhood, the witness took his cattle to a grazing ground on the San Antonio river. Joseph Pierdalla, taking his cattle, went with the witness, and the cattle of the two, witness and Pierdalla, were kept together. Pierdalla was authorized to look after the witness's cattle and re-



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Statement of the case.

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cover them for him when they went astray, but had no authority to sell them. Kasprick, Pierdalla, defendant nor no one else, had authority to sell witness's cattle for him. The witness missed some of his cattle in the winter of 1881 or in 1882, and in the spring of 1882 he received word from Colonel Risinger that if he would come to Helena he, Risinger, could tell him something about them. Witness went, and Colonel Risinger paid him for a heifer in the ZIL brand, which he, Risinger, had sold. Witness and Risinger went together to the court house in Helena, and there Risinger introduced him to the defendant. Witness then demanded of defendant pay for his two steers. Defendant replied that he bought the two steers from John Kasprick. Witness replied that he had never sold any cattle to John Kasprick, and that Kasprick had no authority to sell the two steers. Defendant then paid the witness forty dollars for the two steers. Witness knew the two steers from the description given by the defendant, and had known them since they were calves. Witness did not remember that the defendant said at first that he would not pay witness until Kasprick returned the money he had paid him.

Colonel Risinger was the next witness for the State. He testified that he was the inspector of hides and animals for Karnes county, in 1882. During the spring of that year he went to the defendant's to inspect a number of cattle the defendant was selling to John L. Rutledge. Among the number he found one animal in the ZIL brand, which he knew to belong to Emil Zuehl. Witness asked defendant if he had a bill of sale for that animal. He answered that he had not, but John Kasprick had. Witness turned to Kasprick, who was present, and asked him for the bill of sale. He, Kasprick, said in reply that he had one, but that it was at home. Witness told Kasprick that he must produce it by next evening. Kasprick said that Joseph Pierdalla sold him the cattle and gave him the bill of sale. Kasprick failing to put in an appearance, or to produce a bill of sale, the witness himself sold the animal to Rutledge. A short time after this the witness was called to inspect a lot of hides that were being sent to market from Helena. Among the number he found two brown hides, bearing the ZIL brand. Witness asked defendant about these hides. Defendant said that he had sold the animals to which these hides belonged to Wright, the Helena butcher, and that he himself had previously bought the animals. Witness wrote to Zuehl, and he came to Helena. Witness

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Opinion of the court.

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then paid Zuehl the money he received from Rutledge for the steer he sold, and took him to the court house and introduced him to the defendant, and left the two together. He afterwards saw them talking together, and heard the defendant tell Zuehl that he would not pay for the animals until Kasprick returned the money he had paid him for them. The defendant is the man whom witness saw offering to sell the ZIL steer to Rutledge, as stated.

Joseph Pierdalla testified, for the State, that in the fall of 1881 he and Emil Zuehl drove their cattle to the Conquista crossing of the San Antonio river. Witness had authority from Zuehl to care for his cattle and prevent them from straying, but had no authority to trade or sell any of them. He at no time sold any of Zuehl's cattle to defendant, or to Kasprick, or any one else, nor had he ever executed a bill of sale to any of Zuehl's cattle to Kasprick or any one else.

*Lawhon & Brown*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** Defendant offered to prove on the trial that the cattle in question were purchased for him by another person, to whom he gave money with which to purchase them, and that this other person did purchase and receive them for him, and gave him a bill of sale, saying at the time that it was a bill of sale to said cattle. Defendant also offered in evidence the bill of sale. This proposed evidence was rejected upon the ground that it was irrelevant.

We think the court erred in rejecting it. If the defendant did in fact purchase the cattle through an agent, and the cattle were received by said agent when the defendant was not present, before the defendant could be legally convicted the proof would have to show that he consented to the receiving of the cattle by his agent without a bill of sale. (*Houston v. The State*, 13 Texas Ct. App., 595.) Defendant did not purchase the cattle from Kasprick, but claimed to have paid said Kasprick the money to purchase the same for him, and he proposed to prove these facts, and to prove further that Kasprick told him he had purchased the cattle for him, at the same time delivering him a bill of sale therefor.

We are clearly of opinion that this testimony was admissible,

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Syllabus.

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and if the facts be as they are asserted by the defendant, it was Kasprick, and not the defendant, that violated the law by purchasing and receiving the cattle without taking a bill of sale from the owner thereof.

Purchasing and receiving the cattle without taking a bill of sale therefor from the owner thereof, or his agent, is the offense charged in the indictment. The venue of the offense is the county in which the cattle were purchased and delivered. There is not a particle of evidence in the record, either direct or circumstantial, which proves that the offense was committed in Karnes county.

Because the court erred in excluding the evidence offered by the defendant, and because the venue of the offense was not proved, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered April 26, 1884.

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[No. 2914.]

**LAWYER COWELL *alias* CAT-CHA-FICK-HARJO v. THE STATE.**

16	57
36	363

1. **THEFT—INDICTMENT—ARREST OF JUDGMENT.**—The indictment charged that the defendant, on July 20, 1883, in the Creek Nation, Indian Territory, did fraudulently take, steal and carry away from the possession of one B., three horses, the personal property of said B., without his consent, etc. That, on August 1, 1883, the said defendant did bring the said horses into the county of G., State of Texas. That on the said thirtieth day of July, 1883, the said acts of defendant constituted the offense of theft of horses, and were punishable as such, under and by virtue of the laws of the said Creek Nation, then in full force. *Held*, that the indictment was sufficient to charge the offense of horse theft, wherefore the motion in arrest of judgment was properly overruled.
2. **SAME—PRACTICE—EVIDENCE BY DEPOSITION.**—Proof that a witness resided beyond the limits of the State sufficiently established the predicate for the introduction in evidence of his written testimony, taken before an examining court.
3. **SAME.**—It was urged against the competency of the written testimony that it was not sent to the clerk of the district court, sealed up in an envelope, etc. *Held*, that the objection was untenable, in view of the fact that the writing was identified as the testimony of the witness by the magistrate who reduced it to writing, and was properly certified to by him at the time it was subscribed and sworn to by the witness.

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Statement of the case.

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4. **SAME.**—The State was properly permitted to prove that the words "Muscogee" and "Creek" signify the same thing, and that the "Muscogee Nation" is the same as the "Creek Nation." Such proof, however, was not necessary, inasmuch as it was a matter of which the court was authorized to take judicial notice.
5. **SAME.**—The trial court admitted in evidence the printed Code of Laws of the Muscogee Nation, and in this action it did not err, the book purporting to be published by authority of the said Nation, and being certified to be a true copy of the manuscript laws of that Nation, which certificate was authenticated by the signature of the Principal Chief of that Government, under the great seal thereof. See the opinion *in extenso* on the question.
6. **SAME—FACT CASE.**—See evidence *held* sufficient to support a conviction for horse theft.

**APPEAL** from the District Court of Grayson. Tried below before the Hon. R. Maltbie.

The conviction was for the theft of three horses, the property of one Fred Brown. They were taken, according to the indictment, in the Creek Nation, in the Indian Territory, on the thirtieth day of July, 1883, and on the next day were brought into the county of Grayson, in the State of Texas. The indictment further alleged that, under the laws of the Creek Nation, then in force, the acts charged constituted the offense of horse theft. A term of five years in the penitentiary was the penalty assessed by the jury.

The written testimony of Fred Brown was the first evidence introduced by the State. He testified that he was, and had been twenty years, a resident of the Creek Nation, in the Indian Territory, living on his place, which was distant from Sherman, Texas, about one hundred miles. He knew the two parties charged in separate indictments with the theft of the horses for which the defendant is now on trial. The defendant's English name is Lawyer Cowell. His Indian name, the witness understood to be Cat-Cha-Fick-Harjo, which, interpreted, means Tiger-with-the-Crazy-Heart. The other party charged bears the English name Wilson Wallow, his Indian name being Osooch-Harjo, meaning in English, Crazy Fellow, or Run Mad. They are Creek Indians, and live near the witness, in the Creek Nation. Witness had seen them around and about his place nearly all of the summer of 1883.

Three horses were stolen from the witness on the last Monday in July, 1883. One was a large bay mare, branded R on the

## Statement of the case.

right shoulder, worth seventy-five dollars. The second was a bay yearling colt, in the same brand, worth thirty dollars, and the third was a light bay mare pony, branded F on the left shoulder, worth about twenty dollars. These animals belonged to the witness; they were in his possession when taken, and were taken without his consent. Witness followed the defendant and his companion, and saw them next after the theft in jail at Sherman. He found his horses in the possession of deputy United States marshal Wright, in Denison. To this writing the signature and cross mark of the witness were attached, attested by R. S. Bullock. It was certified by the said Bullock, justice of the peace, as the testimony of the witness, subscribed and sworn to, and was also identified by Bullock on the stand.

H. G. McConnell was next placed upon the stand, by the State. He testified that he met the defendant and another Indian in Denison, Grayson county, Texas, on the second day of August, 1883. They had in their possession, and were offering for sale, the animals described in the indictment. The witness purchased the two bay mares for ten dollars apiece. They were worth at least fifty dollars each. These animals were taken away from the witness by deputy United States marshal Wright, as the property of Fred Brown. Witness saw Fred Brown in Denison two or three weeks afterwards. Brown then claimed the animals.

By Eli Gentry, a colored citizen of the Creek Nation, the State proved that "Muscogee" and "Creek" were synonymous terms, and that the "Muscogee Nation" meant the same as the "Creek Nation."

The State then introduced in evidence a book, entitled on the back, "Laws of the Muscogee Nation," and on the title page, "Constitution and Laws of the Muscogee Nation: Published by authority of the National Council." The following certificate, in script, was attached to the said book:

"EXECUTIVE DEPARTMENT, MUSCOGEE NATION,  
"MUSCOGEE NATION, INDIAN TERRITORY,  
"OKMULGEE, I. T., Dec. 7, 1883."

"I hereby certify the book to which this certificate is hereto attached, titled the 'Laws of the Muscogee Nation,' is a correct and true copy of the original laws in manuscript, now on file in this office; and that the words 'Creek' and 'Muscogee' are synonymous terms.

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Opinion of the court.

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"Given under my hand and seal of the Muscogee Nation, the date above written.

[Great Seal of the  
Muscogee Nation.]

"J. M. PERRYMAN,  
"Prin. Chief M. N."

Section — of Article III, on page 33 of said book, was then read in evidence. That section is as follows:

"Any person who shall unlawfully, by stealth or force, possess himself of the property of another, shall be guilty of theft, and shall, upon conviction, for the first offense, receive fifty lashes upon the bare back; for the second offense, receive one hundred lashes upon the bare back, and for the third offense shall suffer death by shooting."

The motion for new trial raised the questions passed upon in the opinion, and disputed the jurisdiction of the trial court.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** 1. It is alleged in the indictment that defendant, on the thirtieth day of July, 1883, in the Creek Nation, in the Indian Territory, did fraudulently take, steal and carry away from the possession of one Fred Brown three horses, the personal property of said Brown, without his consent, etc. And that on the first day of August, 1883, the said defendant did bring said horses into the county of Grayson, State of Texas. And that on the said thirtieth day of July, 1883, the said acts of said defendant constituted the offense of theft of horses, and were punishable as such under and by virtue of the laws of said Creek Nation, then in full force. We think this indictment is in strict accordance with the law, containing every necessary allegation, and that the defendant's motion in arrest of the judgment, based upon supposed defects in the indictment, was properly overruled. (Penal Code, Arts. 798, 799; *State v. Morales*, 21 Texas, 298.)

2. It was not error to permit the written testimony of the witness Fred Brown, taken before an examining court, to be read in evidence. The proper predicate for the introduction of it was laid by proving that the witness resided out of the State, etc. It was no objection to this testimony that it had not been sent to the clerk of the district court sealed up in an envelope,

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etc. It was identified as the testimony of the witness by the magistrate who reduced it to writing, and was properly certified to by him at the time it was subscribed and sworn to by the witness. (*Evans v. The State*, 12 Texas Ct. App., 370.)

3. It was not error to permit the State to prove that the words "Muscogee" and "Creek" signified the same thing, and that the "Muscogee Nation" was the same as the "Creek Nation." It was in fact unnecessary for the State to make this proof, as it is a matter of public history, and of which the courts take judicial notice. (*Encyclopædia Britannica*, vol. 12, p. 868; 1 *Whart. Ev.*, sec. 338.)

4. It was not error to admit in evidence the Code of Laws of the Muscogee Nation. The book purported to be published by authority of said Nation, and was certified to be a true copy of the manuscript laws of said Nation, which certificate was authenticated by the signature of the principal chief of that government, under the great seal thereof. The Muscogee or Creek Nation is one of the five civilized tribes of Indians settled by the United States government in the Indian Territory. These civilized tribes, while under the general supervision and control of the United States, have local governments of their own. Besides a principal and subordinate chiefs, they have councils, which correspond in many respects to the Legislature of a State.

They also have simple codes of laws and courts to enforce them. These local governments come within the meaning of "foreign governments," as used in Article 2250 of our Revised Statutes. "Foreign" signifies that which belongs to another; that which is strange. Every nation is foreign to all the rest; and the several States of the American Union are foreign to each other with respect to their municipal laws. (1 *Bouvier's Law Dic.*, word "Foreign;" *Cummins v. The State*, 12 Texas Ct. App., 131.)

We have discovered no error in this record. The charge of the court is in all essentials full and correct, and the evidence amply sufficient to support the conviction. The judgment is affirmed.

*Affirmed.*

Opinion delivered April 26, 1884.

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Statement of the case.

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29 591

[No. 2889.]

BILL BASS v. THE STATE.

1. **RAPE—EVIDENCE—THREATS.**—The indictment charged that the rape was committed by force, and did not include a count that it was effected by threats. The State was permitted to prove that when the injured party attempted to give the alarm, the defendant placed his hand over her mouth, and commanded her to desist on pain of death. To this evidence the defense objected, because force was the only means alleged in the indictment. But *held*, that the evidence was admissible; first, because it was *res gestæ*; second, because it bore directly upon the question of consent; third, because it showed the intent of the assailant; and fourth, because it was an important fact to be considered in passing upon the character and degree of force used by defendant to accomplish his purpose.
2. **SAME.**—With regard to force, in the perpetration of rape, the statute, Article 520 of the Penal Code, requires that it shall be such as might reasonably be supposed to be sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances in the case. In determining upon the sufficiency of the force used, the jury is authorized to take into consideration threats made at the time of the commission of the offense. *Sharp v. The State*, 15 Texas Court of Appeals, 171, cited and approved.
3. **SAME—FACT CASE.**—See evidence held sufficient to support a capital conviction for rape.
4. **PRIVILEGE OF COUNSEL.**—Even when it is apparent that prosecuting counsel assumed and commented, in argument, upon a fact not in proof, this court will not, for that reason alone, reverse a conviction, unless it is made clearly to appear that such conduct was calculated to prejudice the rights of the defendant.

APPEAL from the District Court of Lamar. Tried below before the Hon. R. R. Gaines.

The conviction in this case, whereby the appellant was awarded the death penalty, was predicated upon an indictment which charged him with the rape of Lou Williams, an inmate of the Lamar county poor farm, in Lamar county, Texas, on or about the twenty-first day of October, 1883.

Mary Curtis was the first witness introduced by the State. She testified that she knew the defendant, and pointed him out in court. She saw the defendant at the Lamar county poor farm,



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Statement of the case.

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where he had been staying, on or about the twentieth day of October, 1883. He came to the city of Paris on that day. The witness again saw him on that day, between the hours of eight and nine p. m., in the room of Lou Williams, in the house situated on the said poor farm. Lou Williams is a paralytic. The witness heard Lou Williams calling as though she was smothering, and, taking her oldest child and a lamp, witness went into Lou Williams's room. When she got into the room she saw the defendant in bed with, and lying upon top of Lou Williams, having her clothes pulled up. Lou Williams was fighting the defendant with both hands. The witness called Mr. Chambers three different times before the defendant moved from the bed. When he did so he attempted to hide his face with a quilt. He went out of the room holding his hands before him, as though he was holding his clothes up. Lou Williams immediately complained to witness, and told her what had taken place. The defendant came back after all this occurred, but witness did not see him again that night. Chambers and Pursell were on the place at the time of this occurrence, and Mr. Bates came soon after. The defendant had been on the place about two months. Witness lived on the poor farm. Lou Williams is about twenty-one years of age.

Cross-examined, the witness stated that she had retired when Lou Williams gave the alarm. This was between eight and nine o'clock—not later perhaps than half-past eight—on a Sunday night. The house in which the offense was perpetrated had double rooms with a stack chimney between them. There were doors in the north and south sides of the house, but none in the partition. Lou Williams was in the west, and the witness in the east room, adjoining. Witness slept in the east extreme of her room, and Lou Williams slept in a bed that stood in the centre of her room. Lou made no other outcry than to call the witness by name, though she made a noise like she was smothering. The witness got up immediately, lit a lamp, went into Lou's room, and discovered the defendant as stated, and being much excited she stepped instantly to the door and called Mr. Chambers. Defendant left the room after witness had called Chambers three times. About two minutes elapsed before Chambers arrived. The defendant went out at the north door, his back toward witness and with his hands in front of him. The witness was on the south side gallery when she saw the defendant on top of Lou Williams. His head was toward the

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Statement of the case.

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witness when he attempted to cover it with the quilt. Witness next saw the back of the defendant only as he went out at the door. He said nothing that the witness heard. He wore a hat and coat.

The defendant was at breakfast the next morning at the usual time, which was the first time the witness saw him after he left Lou Williams's room. Lou and Chambers were at breakfast at the same time. The defendant went about his work after he got his breakfast. About two minutes after he ran out of the room in which he had assaulted Lou Williams the defendant returned and called for his supper, which witness refused to give him. Witness heard but did not see him at this time. No one was at the house at the time of the assault besides Lou and defendant except witness, her children and a crazy woman. Chambers had been there, but had gone to the house occupied by him. When witness refused to give the defendant his supper, he left, saying that he was going to bed. Mr. Chambers did not see the defendant in Lou's room. The defendant tried to pull the quilt over his face and hide it, but in this he did not succeed. As soon as the witness saw the man on Lou, she recognized him as the defendant.

The room in which Lou Williams slept was of good size, and contained three beds. The door was partly open when the witness went in. Witness approached the bed at the head, and got within nine feet of the defendant. His face was turned down, but not against Lou's, nor too far down for witness to see his whole face. The girl was fighting him, and he seemed to be attempting to protect his face. Witness knew his clothes, including the coat, which was the same he was now wearing. Witness identified the defendant by his face, which she saw as she went into the room. Defendant did not look back on his way out of the room, and during his passage out the witness saw only his back. The witness heard him as he came from town just before he made the assault on the girl. As he went into the house he was whistling, by which means she recognized him. She also knew him by his walk. Some three or four minutes after he came home whistling the alarm was given.

Lou Williams was the next witness for the State. She testified that she knew the defendant, and pointed him out in court. He came into the witness's room on the poor farm one night during the month preceding this trial, got in bed with and on top of witness, and, when witness called out in alarm, which

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Statement of the case.

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she did immediately, he put his hand over witness's mouth and told her that if she hallooed he would kill her. He then pulled the witness's clothes up, her legs apart, and inserted his private parts into her private parts. He laid on the witness about five minutes, and accomplished his purpose without the consent of the witness.

On cross-examination, the witness stated that it was dark in her room when this outrage upon her was perpetrated, and she could not see until the lamp was brought in, but she knew that the defendant was the man who outraged her. She knew him by his voice, although he spoke in a whisper, and she had never before heard him whisper. Witness felt his head in the struggle. He had on an old black hat. The witness knew him before the light was brought into the room. When he first got into the bed witness thought it was old "Aunt Sallie," and kicked him twice. He put his hand over witness's mouth before he pulled up her clothes. He then said he would kill her if she called out. About a minute later, Mrs. Curtis came in. Witness knew for another reason that defendant was her assailant—no other negro knew where she slept. Two or three negroes took dinner with defendant a day or two before this.

Freeman Purcell was the next witness for the State. He testified that he was living on the Lamar county poor farm on the twentieth day of October, 1883. He did not see the defendant on the Sunday of the alleged rape. Between eight and nine o'clock that night he heard some one, who appeared to have just come from town, getting over the poor farm fence, and asked who it was, and was answered: "It is me, Bill." The defendant then came up to witness and asked witness what was the occasion of the commotion at the other house. Witness replied that he did not know. He replied that he would go and see—that he wanted his supper, anyway. He shortly returned to the house occupied by witness and said that the parties at the other house accused him of creating the disturbance. Witness went into his house, lighted a lamp, and advised the defendant not to leave. He replied that he was not guilty of anything and would not run off. Witness started off, but was called back by defendant to extinguish the lamp. Defendant was at the poor farm next morning. The house occupied by the witness and the defendant stood northwest of that occupied by Lou Williams. When first accosted by the witness on the night of the alleged rape, he, defendant, said that he had just come from town.

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Statement of the case.

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Cross-examined, the witness stated that when he first heard the defendant on the night in question he, defendant, was or seemed to be coming across the Latimer field, from the direction of town. Witness went to Mr. Bates's house, and Bates returned with him, but said nothing. Witness knew of nothing that the Irishman told defendant when the latter went back to the house occupied by Lou Williams and Mrs. Curtis, to get his supper. Witness did not remember whether defendant wore a hat or cap on that night. He did not know that defendant owned a cap. He owned two hats.

James Bates was the next witness for the State. He testified that he was in charge of the Lamar county poor farm. The defendant lived there on or about Sunday, October 20, 1883. The defendant was not on the farm on that day after ten or eleven o'clock in the morning. His practice was to go to town every Sunday, and two or three nights in every week. The witness saw and spoke to Lou Williams on that Sunday night, after the alleged rape. She was crying at that time. Two crazy women, one very deaf, usually occupied the room with Lou Williams. The witness saw the defendant that night, at which time he had on a small black hat. A party going the front way from the house occupied by Lou Williams to that occupied by Purcell would have to go through a gate or scale a fence. A horse lot stood between the two houses, and parties passing between them sometimes went around the horse lot.

Cross-examined, the witness stated that a lane ran east and west between the D. F. Latimer field and the poor farm. All of the houses on the farm belong to the county, and stand about seventy-five yards apart. Witness did not remember whether or not the defendant had on a coat. He was dressed then very much as he was dressed on this trial, except that he wore a small black hat. He said that he had been to Mrs. Curtis for his supper, which she refused to give him.

County physician Bullett testified, for the State, that Lou Williams, the alleged injured party, was a paralytic, and had very little use of her limbs.

Mary Curtis, recalled for the State, testified that she saw the defendant on the morning of the day of the alleged outrage. He wore a cap when he said that he was going to town. When he returned that night he had on a hat.

Cross-examined, the witness stated that the defendant came to Lou Williams's room that night from the direction of town.

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Statement of the case.

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If he went to his own room at all, the witness did not know it. The witness only saw him that night in Lou's room. She heard but did not see him when he asked for his supper. She heard him ask Mr. Bates why the witness would not give him his supper. After she had refused to give him supper, she heard him talking to the Irishman at the wood pile, but could distinguish nothing he said.

James Bates, being recalled by the State, testified that no negro other than the defendant staid on the Lamar county poor farm at the time of the alleged offense. Defendant said to the witness that night, after the discussion of the affair began, that he did not know what to do. Witness told him that if he had done nothing he ought to go to bed.

Cross-examined, the witness said that the defendant called him out of his house that night and told him that Mrs. Curtis would not give him his supper—that she had even refused him cold victuals. Witness told him of what the people at the house accused him. The defendant went about his customary work next morning.

James Yates testified, for the State, that he arrested the defendant on the morning after the alleged rape, and confined him in jail. Witness found the defendant in the woods of the poor farm, chopping a log. This was two or three miles from the farm, and about the same distance from Paris. He had the county team, and was getting wood. The State closed.

The defense introduced Charles Patterson as the first witness. He testified that he knew the defendant by sight, but not by the name of Bill. The defendant was at Woodson Hughes's, in the city of Paris, between the hours of eight and nine, on the Sunday night of the alleged rape.

Cross-examined, the witness said that he had no watch and only guessed at the time. While he felt confident that he saw the defendant at Hughes's between eight and nine o'clock, he would not positively swear to that hour. It might possibly have been as early as seven o'clock. It was some time after dark.

Ira Williams testified, for the defense, that he saw the defendant at Woodson Hughes's, in Paris, and left him there, some time after dark. He did not know how long after dark this was.

The motion for new trial set up the questions discussed in the opinion.

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Opinion of the court.

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No brief for the appellant has reached the Reporters

*J. H. Burts*, Assistant Attorney General, for the State.

HURT, JUDGE. Appellan. was convicted of the rape of Miss Lou Williams, an inmate of the poor farm of Lamar county, and his penalty was assessed by the jury at death. There is no assignment of errors in the record, nor brief filed for appellant in this court.

Three grounds were urged in the motion for new trial in the court below: 1. As the indictment alleged that the rape was effected by force, omitting threats, that the State was confined to this means, and could not legally prove threats made by the defendant at the time of the carnal intercourse.

On the twentieth of October, 1883, at the poor farm in Lamar county, Lou Williams, the prosecutrix, a paralyzed lady of about twenty-one years of age, was in her room in bed. Her room was the west room of a house containing two rooms, the east one of which was occupied by Mrs. Curtis. About eight o'clock at night, some person, whom she at first believed to be her aunt, came to and got on her bed. Immediately, however, on entering the bed, the party placed his hand on the mouth of Miss Williams, and began to pull up her clothes, when she began to "hollow for Mrs. Curtis," whereupon her assailant whispered to her: "If you hollow, I will kill you."

The indictment having selected *force* as the only means by which the rape was effected, had the State the right to prove this threat, made at the time and place stated? Beyond any sort of a doubt this proof was legitimate. First, it was *res gestæ*. Second, it bore directly upon the question of consent. Third, it showed the intent of the assailant. And fourth, it was an important fact to be considered in passing upon the character and degree of force used by defendant to accomplish his purpose.

Article 529 of the Penal Code requires the force to be such as might reasonably be supposed to be sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case. The question is whether, in determining the sufficiency of the *force*, threats can be considered. In *Sharp v. The State* (15 Texas Ct. App., 171), decided at the last Tyler term, we held that evidence of threats was not only admissible as *res gestæ*, but could be looked to and

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Opinion of the court.

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considered by the jury in passing upon the sufficiency of the force used. The reasons enumerated in that opinion we believe to be correct, but whether admissible for this purpose or not, evidently as *res gestæ*, and as evidence tending to elucidate the intention of the assailant, and bearing upon the question of consent, this threat was admissible.

There is no complaint of the charge of the court upon the subject, the learned judge presiding confining the jury in his charge to *force* as the means used by which the rape was effected.

2. Does the evidence support the verdict? We have examined the statement of facts critically and with that earnestness demanded by the terrible penalty imposed by the jury in their verdict, and are forced to the conclusion that, if the witnesses testified the truth, the verdict is amply supported by the evidence. (The Reporter will insert the evidence.)

3. That the argument for the State was not proper. Counsel for the State made some observations to the effect that the prosecutrix, seeing defendant under such circumstances, would not be likely ever to forget his features. This was argument, and whether sound or fallacious, this court will not reverse the judgment. It is contended by the appellant that there is no evidence that the prosecutrix saw the features of defendant, and that therefore these remarks were out of the record. We believe that there is evidence tending to show that the prosecutrix saw the face of defendant; but, suppose we concede that the counsel for the State assumed a fact and commented upon such fact which was not in proof, this court would not reverse the judgment unless such conduct was very clearly calculated to prejudice the rights of defendant. To reverse in all cases in which counsel did not confine themselves to the record would render trials farces. In fact, rare would be the case in which such irregularities would not occur.

We have given to this record our most careful attention, and must say that there is no such error, if there be any, as will authorize us in disturbing the judgment, and it is affirmed.

*Affirmed.*

Opinion delivered April 26, 1884.

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Statement of the case.

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807 612

[No. 2952.]

## R. M. BEVILLE v. THE STATE.

1. **ARREST—FALSE IMPRISONMENT.**—The ordinances of the incorporated town of D. making drunkenness and breaches of the peace offenses, the marshal of the town or his deputy was authorized, without warrant, to arrest a party infringing such ordinances in his view. The fact that the drunken man's proposition when first arrested, to give bond, was refused and he was confined in the calaboose for an hour, will not authorize a conviction for false imprisonment.
2. **SAME—CHARGE OF THE COURT.**—Upon the question of the right of the deputy marshal to arrest a party detected in the violation of the ordinance, the trial court charged that, in order to make a valid arrest, such officer must have "express" authority. *Held*, error.

APPEAL from the County Court of Wise. Tried below before the Hon. G. B. Pickett, County Judge.

The opinion discloses the nature of the case. A fine of ten dollars was the penalty imposed.

The evidence disclosed, in substance, that Decatur, Wise county, was a town incorporated under the general incorporation act of the State; that its ordinances denounced drunkenness and breaches of the peace as offenses; that H. C. Carter was drunk and in the act of committing a breach of the peace in the presence of N. C. Cargill, marshal, and the defendant, deputy marshal, of the town; that the marshal and the defendant, having no warrant, arrested Carter, and started to the town calaboose with him; that Carter proposed, as soon as arrested, to execute a bond for his appearance before the mayor's court, and that several parties present, some of whom were solvent, proposed to sign such bond as sureties; and that the marshal declined to accept a bond. There was no proof that the marshal heard any solvent person propose to go on the bond. It was proved, also, that while the defendant and the marshal were taking Carter to the calaboose, Carter tripped the marshal, threw him down and stamped him, and, while the marshal was unlocking the calaboose door, that Carter struck the marshal a blow in the face, whereupon the marshal struck Carter a severe blow over the right eye, drawing the blood. Carter was con-



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fined in the calaboose for about one hour, and was released on bail.

The motion for new trial raised the questions involved in the opinion.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

**HURT, JUDGE.** N. C. Cargill, marshal of the city of Decatur, and the appellant, deputy marshal, arrested one H. C. Carter within the limits of said city, while said Carter was intoxicated in a public place, and in the act of committing a breach of the peace in the view of said officers. The arrest was made without a warrant. The marshal and appellant, his deputy, carried Carter to the calaboose, a place provided by the city for the detention of city prisoners, and there kept him confined about an hour, when he was liberated on giving an appearance bond. Carter proposed to give such bond when he was arrested, but this was refused by the marshal and appellant. By ordinances of the city of Decatur drunkenness and breaches of the peace are made offenses.

Appellant was prosecuted to conviction for false imprisonment; from which conviction he appeals to this court. Under the above state of facts, had appellant the right to arrest and imprison Carter as he did? We are most clearly of the opinion that he had. Nor does the fact that Carter offered to give bond when arrested affect the question.

As stated in the case of *Scircle v. Neeves*, 47 Indiana, 289: "There is probably not a city or town in the State making any pretense to proper municipal government that has not an ordinance in substance the same as this (one making drunkenness an offense), and whose police officers do not constantly arrest, lock up and afterward carry before the courts, persons who violate its provisions. Such persons must learn that society has the right to protect itself against the evil influences of their example, and that they are proper objects of municipal legislation, arrest and punishment." This we believe to be the correct doctrine.

We are of the opinion that it was the duty of the marshal, or his deputy, to arrest and confine Carter until he became sufficiently sober and rational as not to be a nuisance to peaceable

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Statement of the case.

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and orderly citizens of the city. Society has rights as well as the citizen, and when the good order of society is thus invaded and defied, her officers should act promptly and effectively.

This verdict is not supported by the evidence, and for this, if no other reason, the judgment would be reversed.

The learned judge charged the jury that defendant must have *express* lawful authority to make the arrest. This was calculated to mislead the jury. If, from all the circumstances, the law would authorize the arrest, by a fair construction, defendant would not be guilty because the power was not *expressly* given. Because the charge was erroneous, and because the evidence does not support the verdict, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered April 26, 1884.

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[No. 3078.]

HERMAN DRINKOETER v. THE STATE.

**OBSTRUCTION OF A PUBLIC ROAD—PRESUMPTION OF INNOCENCE—CHARGE OF THE COURT.**—The court charged the jury as follows: "If you believe from the evidence that the defendant obstructed the road charged to have been obstructed, in Guadalupe county, and that said road is a public road, and that in doing so an offense was committed, the law then presumes that the act was intentionally and wilfully done, and it rests with the defendant and devolves upon him to prove the accident or innocent intention." Another charge was as follows: "On the trial of a criminal action, when the facts have been proved which constitute the offense, it devolves upon the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission." *Held*, that both of these charges were erroneous. See the report of this case on former appeal, 14 Texas Court of Appeals, 67.

APPEAL from the County Court of Guadalupe. Tried below before the Hon. W. P. H. Douglass, County Judge.

The conviction in this case was for the obstruction of a public road known as the Prairie Lea and New Braunfels road. It was based upon the same information and upon the same evidence

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Opinion of the court

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as those upon which a former conviction was had, which was reversed and remanded by this court at its last Austin term. (See 14 Texas Ct. App., 67.) The penalty imposed in this case was a fine of one dollar.

*W. R. Neal*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** Among other instructions the court gave to the jury the following: "If you believe from the evidence that the defendant obstructed the road charged to have been obstructed, in Guadalupe county, and that said road is a public road, and that in so doing an offense was committed, the law then presumes that the act was intentionally and wilfully done, and it rests with the defendant and devolves upon him to prove the accident or innocent intention." Again the court charged: "On the trial of a criminal action, when the facts have been proved which constitute the offense, it devolves upon the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission." These instructions were given at the request of the county attorney, and were excepted to at the time by the defendant.

On a former appeal of this case, the judgment was reversed mainly because the court erred in giving to the jury a charge in substance the same as those we have above quoted. We stated plainly in the opinion then rendered that such a charge was not the law of the case, was not applicable to the facts of the case, and was erroneous. We must presume that the trial judge and the county attorney had not read or duly considered our former opinion in the case, or they would not have committed the same error upon the second trial that was committed upon the first. It is unnecessary for us to reiterate what we have heretofore decided to be the law of this case. We will again set aside the conviction and remand the cause for a new trial, in accordance with our opinion on the former appeal, which will be found in 14 Texas Court of Appeals, 67. Whether right or wrong, that opinion is the law of this case.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered April 30, 1884.

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Opinion of the court.

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[No. 2894.]

W. A. THOMPSON *v.* THE STATE.

1. **THEFT—INDICTMENT—INTENT.**—To constitute theft there must be an intent on the part of the person taking the property, at the time of the taking, to deprive the owner of the property of the value of the same, and to appropriate it to the use and benefit of the person taking. The word “it” has been properly held to refer to the antecedent word “property.” In this case the indictment charges the intent as follows: “With the fraudulent intent to deprive the said Elisha Davis of the value of same, and to appropriate the *value* of the same”—using the word “value” instead of the word “it.” *Held*, that the indictment is in substantial compliance with Article 430 of the Code of Criminal Procedure, and is therefore sufficient.
2. **SAME—PRACTICE IN THE COURT OF APPEALS—STATEMENT OF FACTS.**—In the absence of a proper statement of facts the only duty of this court is to determine whether the indictment is sufficient to sustain the charge of the court and the judgment of conviction; and a statement of facts filed after the adjournment of court, in the absence of an order of court, embodied in the record, showing that such filing was authorized, cannot be considered by this court for any purpose whatever.

APPEAL from the District Court of Lee. Tried below before the Hon. I. B. McFarland.

The indictment charged, and the jury found the appellant guilty of the theft of two head of cattle, the property of Elisha Davis. A term of two years in the penitentiary was the punishment assessed.

*Rector & Harris*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** To constitute theft, there must be an intent on the part of the person taking the property, at the time of the taking, to deprive the owner of the property of the value of the same, and to appropriate it to the use or benefit of the person taking. (Penal Code, Art. 724.) It has been held that the word *it*, as used in the foregoing sentence, refers to the antecedent word *property*. (*Goodson v. The State*. 32 Texas, 121.) We

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Opinion of the court.

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think such is the proper grammatical construction of the sentence.

In charging the intent, the indictment before us uses the following language: "With the fraudulent intent to deprive the said Elisha Davis of the value of same, and to appropriate the *value* of same," etc., using the word *value* instead of the word *it*, used in the statute. It is contended that this is a fatal defect in the indictment, and that the defendant's exception to the same because of such defect should have been sustained.

While it is the safer practice to use the precise words of a statute in charging the offense, it is not always essential to do so. If the indictment follows the statute in *substance*, it will suffice. If the offense be set forth in plain and intelligible words, which are of equivalent or more extensive meaning than those used in the statute in defining the offense, the indictment will be good. (Code Crim. Proc., Art. 420; Clark's Crim. Law, p. 420, note.) We think the indictment in this case sufficiently and substantially alleges the intent with which the property was taken. It would be preposterous to say that the defendant could take the property with intent to deprive the owner of the value of it, and to appropriate that *value* to his own use or benefit, without an intent at the same time to appropriate the *property* itself to his own use or benefit. He could not appropriate the *value* of the property without at the same time appropriating the *property*. He might perhaps appropriate the property without appropriating its value, but if his intent was to appropriate its value, this certainly included the intent to appropriate the property. We think the objection made to the indictment does not reach to the substance of it, but is merely a criticism upon its grammatical construction, which, while perhaps well founded, is not sufficient to set it aside.

There is no statement of facts in the case that we can consider. There is in the record what purports to be a statement of facts, but it shows upon its face that it was approved by the trial judge after the adjournment of the term of the court at which the trial was had, and there is no order in the record allowing time after the adjournment of the court within which to prepare and file a statement of facts. This being the state of the record, we cannot determine other questions presented by the assignment of errors and in the brief of counsel for defendant. In the absence of a statement of facts our only duty is to see if the indictment is sufficient to sustain the charge of the

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Syllabus.

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court and the judgment of conviction. (Clark's Crim. Law, p. 577, note; *Gerrold v. The State*, 13 Texas Ct. App., 345.) We find no error in the record which would authorize a reversal of the judgment, and it is therefore affirmed.

*Affirmed.*

Opinion delivered April 30, 1884.

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[No. 2913.]

BUD CHAPMAN v. THE STATE.

1. CONSTITUTIONAL LAW—JURISDICTION.—Jurisdiction over misdemeanor cases is conferred by the Constitution upon the county and justices' courts. The district courts can supercede the county courts in such jurisdiction only when so empowered in the manner prescribed in Article 5, section 22, of the Constitution. The act of March 16, 1883 (Laws of Eighteenth Legislature, page 24), divested the county court of Atascosa county of jurisdiction over criminal cases, and vested in the district court of said county exclusive jurisdiction over criminal cases then pending in said county court. *Held*, that, in this manner the said district court was constitutionally invested with jurisdiction over misdemeanor cases.
2. SAME—CONSTRUCTION OF A STATUTE.—The act of the Legislature referred to proceeds as follows: "And the district court shall have and exercise all the civil and criminal jurisdiction heretofore vested in said county court by the Constitution and laws, and *not* divested by this act." *Held*, that under the recognized rule of statutory construction, that "when the intention of a statute is plainly discernable from its provisions, that intention is as obligatory as the letter of the statute, and will even prevail over the strict letter," the word "*not*," as used in the act, which would otherwise defeat the plain intent of the statute, must be held to have been used by mistake, and should be disregarded in construing the said statute. See the opinion *in extenso* for the rule stated in other but consistent terms.
3. SAME.—The jurisdiction conferred by the act under consideration upon the district court, is the same divested out of the county court, as to all cases not then pending in said county court; that is, the jurisdiction as to cases not pending is not exclusive, but only concurrent with the justices' courts in cases over which the justices' courts have heretofore had jurisdiction. Succinctly stated, the act referred to does not, in any way, affect the jurisdiction of the justices of the peace of Atascosa county.

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Opinion of the court.

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APPEAL from the District Court of Atascosa. Tried below before the Hon. D. P. Marr.

The conviction in this case, under which a fine of ten dollars was levied as punishment, was predicated upon an indictment which charged the defendant with betting at a monte bank.

The transcript brings up no statement of facts. The ground relied upon by the appellant in his motion for new trial was that the court erred in overruling his plea to the jurisdiction of the court. Upon that plea arose the questions discussed in the opinion.

*John A. & N. O. Green*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WILLSON, JUDGE. This case being a misdemeanor over which, under the Constitution, the county and justices' courts have concurrent jurisdiction, exclusive of the district courts, the conviction cannot be sustained unless jurisdiction had been conferred upon the district court of Atascosa county under Article 5, section 22, of the Constitution.

We think this was done by the act of March 16, 1883. (Laws of Eighteenth Leg., p. 24.) That act divests the county court of Atascosa county of jurisdiction over criminal cases. It vests in the district court of said county *exclusive* jurisdiction over criminal cases then *pending* in said county court. It then provides in the following language: "And the district court shall have and exercise all the civil and criminal jurisdiction heretofore vested in said county court by the Constitution and laws, and *not* divested by this act." The word *not*, which we have italicized, evidently was placed where it is found through mistake. If we are to regard it as a word intentionally placed there, its effect would be to defeat entirely the manifest intention and purpose of the statute. It directly conflicts with the other provisions of the act. It confers upon the district court all jurisdiction *not* divested out of the county court, and the only jurisdiction not so divested is that pertaining to probate matter, to issue certain writs, to punish contempts, and to determine questions of eminent domain in certain cases. All other jurisdiction which said county court formerly had is expressly divested out of it by the same act. If this word *not* is left out of the sentence, then

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Opinion of the court.

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the provisions of the act harmonize, and the intent of the Legislature is accomplished.

Are we at liberty, in construing the statute, to disregard this word in order that the plain intent of the law may be made to prevail? We think we are. When the intention of a statute is plainly discernable from its provisions, that intention is as obligatory as the letter of the statute, and will even prevail over the strict letter. (*Brooks v. Hicks*, 20 Texas, 666; *Forshey v. R. R. Co.*, 16 Texas, 516.) A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter is not within the statute unless it be within the intention of the makers. (*Holmes v. Casley*, 31 N. Y., 290; *Chase v. R. R. Co.*, 26 N. Y., 523.) In construing a statute the principal object should be to arrive at the intention of the Legislature. Such construction ought to be given the statute as will best answer the intention which its makers had in view. Whenever the intention can be discovered, it ought to be followed, although it may seem to be contrary to the letter of the statute. (*People v. Utica Ins. Co.*, 15 John. R., 358, 380; *Sedgw. on Con. and Stat. Law*, p. 225 *et seq.*; *Potter's Dwarria on Stat.*, p. 174 *et seq.*)

We are of the opinion that the court did not err in overruling defendant's plea to the jurisdiction. It was competent for the Legislature to divest the county court of its criminal jurisdiction, and to vest that jurisdiction in the district court. (*Mora v. The State*, 9 Texas Ct. App., 406.) This, we think, was accomplished by the act of March 16, 1883.

We are further of the opinion that the jurisdiction thus conferred upon the district court is the same divested out of the county court, as to all cases not then pending in said county court; that is, that the jurisdiction is not *exclusive*, but only *concurrent* with justices' courts, in cases over which justices' courts have heretofore had jurisdiction. In other words, we do not think that the act referred to in any way affects the jurisdiction of the justices of the peace of Atascosa county, but that they have the very same jurisdiction now that they had before the passage of said act.

We have discovered no error in the conviction, and the judgment is affirmed.

*Affirmed.*

Opinion delivered April 30, 1884.



## Statement of the case.

[No. 2957.]

16	79
28	70
16	79
39	143

## RAINEY FENTRESS ET AL. v. THE STATE.

1. **SCIRE FACIAS—BAIL BOND.**—One of the requisites of a bail bond is that it shall state the *time* and *place* when and where the accused binds himself to appear, and the court or magistrate before whom he is to appear. In stating the time, it is sufficient to specify the term of the court; and in stating the place, it is sufficient to specify the name of the court or magistrate, and of the county.
2. **SAME.**—In this case the bail bond was conditioned as follows: "Now if the said Rainey Fentress shall make his personal appearance before the district court of Bexar county to answer to said indictment *instantly*, to be holden in the town of San Antonio, A. D. 1882, there to remain until discharged by the court," etc. *Held*, sufficient, both as to place and time, the term "*instantly*" having a legal signification, and usually meaning within the next twenty-four hours, and when not so meaning, signifying within a reasonable time, under the circumstances of the case with reference to which it is used. See the opinion *in extenso* on the question, and note the distinction between the statute on the subject now in force and that upon which the cases of *Jackson v. The State*, 13 Texas, 218, and *Busby v. The State*, Id., 187, were decided.
3. **SAME—PLEADING.**—See the statement of the case for a bail bond *held sufficient* to show that an indictment, charging the principal therein with an offense against the laws of the State, was pending in the district court of Bexar county. Note, also, that it is a valid obligation, wherefore the motion to quash the same was properly overruled.
4. **SAME.**—See the statement of the case for an answer of sureties which the trial court properly held to present no defense to the action, inasmuch as the facts set up do not come within any of the provisions of Article 452 of the Code of Criminal Procedure, which prescribes the only causes which will operate to exonerate the principal and sureties from liability upon the forfeiture taken.

APPEAL from the District Court of Bexar. Tried below before the Hon. G. H. Noonan.

This appeal was prosecuted from the forfeiture of the appearance bond of Rainey Fentress, bailed in the sum of five hundred dollars, upon an indictment charging him with the theft of a horse. The judgment was for the amount of the bond.

The bond which was a subject matter of controversy reads as follows:

## Statement of the case.

"The State of Texas, }  
 "County of Caldwell. }

"Know all men by these presents, that we, Rainey Fentress, as principal, and J. J. Ellison and Richard Withers, as sureties, acknowledge ourselves to owe, and stand indebted to the State of Texas, in the sum of five hundred dollars, for the payment of which, well and truly to be made, to the State of Texas, we and each of us hereby jointly and severally bind ourselves, our heirs, executors and administrators, firmly by these presents. The condition of the above bond is such that, whereas, the above bound Rainey Fentress has been arrested by virtue of a *capias* issued out of the district court of Bexar county, on a charging by indictment with theft of a horse, and has been held to bail in the sum of five hundred dollars: Now, if the said Rainey Fentress shall make his personal appearance before the district court of Bexar county to answer to said indictment, *instantly*, to be holden in the town of San Antonio, A. D. 1882, there to remain until discharged by the court, then this obligation to be null and void; otherwise to remain in full force and effect. Witness our hands this sixth day of April, A. D. 1882.

"RAINEY<sup>his</sup> FENTRESS.

"J. J. ELLISON.<sup>mark</sup>

"RICHARD WITHERS.

"Approved by me, this April 6, 1882.

"A. Y. LANNAM, sheriff Caldwell Co., Texas.

The amended original answer of the sureties, which is the subject matter of the ruling embraced in the fourth headnote of this report, reads as follows:

"The State of Texas, } In the Bexar county district court,  
 1052. vs. } Texas, September Term, 1882.  
 "R. Withers *et al.* } Amended original answer.

"On this day appeared R. Withers and J. J. Ellison, two of the defendants in the above entitled suit, by Ellis & Mayfield, their attorneys, and file this, their amended answer herein, leave of the court being first had and obtained.

"First. The defendants for answer herein move the court to set aside the said forfeiture, for the reason that the said forfeiture was taken and judgment *nisi* entered upon the records of this court before the day set in the bail bond for the appearance of the defendant Rainey Fentress before the court.

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"Second. Further answering, these defendants move the court to set aside the forfeiture entered on the records of this court against these defendants, sureties on the bail bond of the defendant Rainey Fentress, and say that said bail bond or purported bail bond is illegal, null and void, for the reason that the said bail bond was executed and approved by the sheriff of Caldwell county, Texas, who held said defendant Fentress in custody, while this court, before which said prosecution of said Fentress was pending, was in session at the time said bail bond was taken and approved. Wherefore these defendants pray said forfeiture to be set aside and the bail bond quashed and held for naught.

"Third. Further answering, these defendants move the court to set aside the forfeiture entered against them, and to quash said bond, for the reason that said bond does not comply with the law, is illegal, null and void, for the reason that said bond is indefinite, and does not bind said defendant Fentress to appear at any term of the district court of Bexar county, Texas, known to the law, and for the further reason that said bond and the conditions thereof are impossible of performance.

"Fourth. And further answering, the defendants say the judgment *nisi*, entered at the March term, A. D. 1882, of the district court of Bexar county, Texas, on said bond, against these defendants as sureties ought not to be made final, and defendants ought not to be held liable on said bail bond, for the reason that, on the day on which judgment *nisi* and of forfeiture was taken against these defendants as sureties for the defendant Rainey Fentress, an *alias capias* was issued out of the office of the clerk of this court, directed to the sheriff of Caldwell county, Texas, commanding him to arrest said Rainey Fentress and him safely keep, that he might have him before this court on the sixth day of September, 1882; that said *alias capias* was issued on the same indictment and for the same offense for which said Fentress was arrested at the time said bail bond on which this said judgment *nisi* was taken; that said sheriff of Caldwell county, Texas, executed said *alias capias* by arresting the said Rainey Fentress, and that said Fentress is now willing and ready to answer said indictment; these defendants, as sureties, say that they are released from all further liability on said bail bond by the second arrest and bail of the said Fentress as aforesaid; and the facts, matters and things

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above set forth, these defendants, R. Withers and J. J. Ellison, are ready to verify.

“Fifth. Further answering, these defendants, R. Withers and J. J. Ellison, sureties, say that they ought not to be held liable on said bail bond, and the judgment *nisi* ought not to be made final against them, and move the court to set aside the forfeiture entered against these defendants, for this reason: Defendants say the principal defendant herein is a negro, the said Rainey Fentress; that he is illiterate and very ignorant; that when he was arrested by the sheriff of Caldwell county, Texas, he was informed that he would be tried in September, and when he executed said bail bond he understood by the terms and conditions of said bond that he was bound to appear before the district court of Bexar county, Texas, in September, A. D. 1882; that said Fentress never attempted to escape; that he was and is ready and willing to answer said indictment; that he was not aware said forfeiture had been taken on his bond until he was arrested by the sheriff of Caldwell county on the *alias capias* issued by the clerk of the district court of Bexar county, Texas; that defendants Withers and Ellison, satisfied and believing, and having good reason to believe, that it was not the intention of the said defendant Fentress to escape or attempt to escape from this State, and that said bond was forfeited by inadvertence and mistake, and without the fault of said Fentress, immediately gave and executed, as his sureties, another bail bond, conditioned that said Fentress should be and appear at the next term, in September, 1882, of the district court of Bexar county, Texas. These defendants, R. Withers and J. J. Ellison, say they understood that said Fentress was to be and appear before the district court of Bexar county in September, A. D. 1882; that they were not present either in person or by attorney when said forfeiture and judgment *nisi* was taken; that they were not aware of the same until long afterwards; that had they been so aware that the said bond bound said Fentress to appear at the district court of Bexar county, Texas, prior to September, 1882, they could and would have produced the said Fentress in person before this court, and said forfeiture and judgment *nisi* would not have been taken against these sureties.

“Wherefore the defendants pray the court that said forfeiture and judgment *nisi* may be set aside, and for all such other just and proper relief as in law and equity your honor may find

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these defendants entitled to; and all the above set forth matters and things these defendants say they are ready to verify.

“ELLIS & MAYFIELD,  
“Attorneys for defendants Withers and Ellison.”

C. H. Mayfield, for the appellant.

J. H. Burts, Assistant Attorney General, for the State.

WILLSON, JUDGE. One of the requisites of a bail bond is that it state the *time* and *place* when and where the accused binds himself to appear, and the court or magistrate before whom he is to appear. In stating the *time*, it is sufficient to specify the term of the court; and in stating the *place*, it is sufficient to specify the name of the court or magistrate, and of the county. (Code Crim. Proc., Art. 288.)

In this case the bail bond is conditioned as follows: “Now if the said Rainey Fentress shall make his personal appearance before the district court of Bexar county to answer to said indictment *instanter*, to be holden in the town of San Antonio, A. D. 1882, there to remain until discharged by the court,” etc.

There can be no question but that the bond sufficiently specifies the *place* where the accused was required to appear, but does it sufficiently specify the *time*? It does not state the *term* of the court at which he is to appear, nor does it specify any particular *day* when he is to appear. *Instanter* is the only specification of *time* except that his appearance is to be in the year 1882. Is this a sufficient specification of the time? We think it is. This term *instanter* has a legal signification. It means, usually, within the next twenty-four hours, and when it does not mean this it means within a reasonable time under the circumstances of the case with reference to which it is used. (Bouvier's Law Dict.; Abbott's Law Dict.; Burrill's Law Dict.; Wharton's Law Dict., word “*Instanter*.”)

In the case before us, the accused party was arrested in a county other than that in which the prosecution was pending. When he bound himself to appear *instanter* before the district court of Bexar county, he bound himself to appear before said court forthwith, without delay, in a reasonable time, considering the distance to be traveled, the mode of conveyance, and other circumstances of the case. True, it does not appear from

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the bond that said court was then in session, nor do we think that it was essential that it should so appear. The law fixed the terms of that court, and the obligors on the bond must be presumed to have known that at the time they executed the bond said court was or ought to have been in session in said Bexar county.

Counsel for appellant contend that a bond which requires the accused to appear *instantly* is void, and in support of this proposition cite *Jackson v. The State*, 13 Texas, 218, and *Busby v. The State*, Id., 137. It will be perceived, upon an examination of those cases, that they were decided in accordance with the statute then existing, which statute was quite dissimilar from the provisions of the Code under which the case before us is to be determined. By the statute then in force the bond was to be conditioned for the appearance of the principal *at the next term of the court* thereafter. (Hartley's Digest, Art. 2889.) In the cases cited the bonds were conditioned for the appearance of the principals *forthwith*, and it was properly held that the conditions were more onerous than the law required, and that therefore the bonds were void. The statute governing in this case does not prescribe that the bonds shall require the principals to appear at any specified term of the court, but only that the *time* when he is bound to appear shall be stated in the bond. (Code Crim. Proc., Art. 288.) Therefore, because the bond obligates him to appear *instantly*, it cannot be said that it is more onerous than the statute requires, and is therefore void.

We think it sufficiently appears from the bond that an indictment was pending in the district court of Bexar county against the principal in the bond, charging him with an offense against the laws of this State, that is, the theft of a horse. We are of the opinion that the bail bond is a valid obligation, and that the motion of appellants to quash the same was properly overruled.

We are of the opinion that the court did not err in holding that the answer of the sureties presented no defense to the action. The facts set up in the said answer do not come within any of the provisions of Article 452 of the Code of Criminal Procedure, and no other causes than those enumerated in that Article will exonerate the principal and his sureties from liability upon the forfeiture taken.

We have carefully examined each assignment of error, and

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the authorities bearing thereon, and in our opinion none of said assignments are maintainable

The judgment is affirmed.

*Affirmed.*

Opinion delivered April 30, 1884.

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[No. 3075.]

SECUNDINO ESCARENO v. THE STATE.

1. **PRACTICE—MANSLAUGHTER—CHARGE OF THE COURT.**—Objection that the court erred in omitting to charge the law of manslaughter was first made in the motion for new trial. The rule under such circumstances is, that this court will not interfere unless such omission appears calculated to result to the prejudice of the defendant.
2. **SAME—EVIDENCE.**—The Mexican term "cabron," meaning that the person to whom it is applied consents to the prostitution of his wife, was claimed by the defendant to have been applied to him by the deceased, and upon that ground it is urged that, being an insult to his wife, the homicide could not be murder, but manslaughter, and that the omission of the court to so charge the jury was error. It was proved that some one of several parties present used the word "cabron," but it was not proved that it was the deceased who used it. *Held*, that this evidence was insufficient to disclose prejudice to the defendant in the omission to charge the law of manslaughter. Note, also, that the motion for new trial sets up evidence which clearly discloses that the insulting word was not the moving cause of the homicide.
3. **SAME—VERDICT—PRESUMPTION OF LAW.**—The validity of the conviction is assailed upon the ground that the verdict was not translated into the language of the defendant, who is a Mexican. In the absence of a bill of exceptions presenting such fact, this court cannot proceed upon the assumption that everything stated in the motion for new trial is true, when the record is silent on the subject.
4. **SAME.**—Primarily the presumption of law is in favor of the regularity of all the proceedings in the case. The record fails to show affirmatively whether the defendant was or was not present when his motion for new trial was acted upon. *Held*, that under such circumstances, his presence at the time is presumed on appeal.
5. **SAME—WAIVER.**—In the assignment of errors it was shown that the defendant's right to be present when his motion for new trial was being acted upon was waived by his counsel. Under such circumstances, even though the record showed affirmatively that the defendant was not present, the presumption obtains that the waiver was authorized by the

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Statement of the case.

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- defendant, and the defendant is bound thereby, unless he shows affirmatively that he did not authorize the waiver.
6. **SAME—NEW TRIAL.**—See the statement of the case for newly discovered evidence set up in motion for new trial, but *held* not to be of such character as would tend, if true, to justify, extenuate or mitigate the homicide; wherefore the motion for new trial was properly overruled.
  7. **PRACTICE—TRANSCRIPT.**—See the opinion for suggestions to trial judges respecting the incumbrance of transcripts with foreign matter.
  8. **MURDER—FACT CASE.**—See evidence *held* sufficient to support a capital conviction for murder.

APPEAL from the District Court of Bexar. Tried below before the Hon. G. H. Noonan.

The indictment charged the appellant with the murder of one Ventura del Toro, in Bexar county, on the sixteenth day of April, 1880. The trial of the appellant resulted in his conviction of murder in the first degree, and the penalty of death was awarded him.

Ysidoro Rosas was the first witness for the State. He testified that he was present when the defendant killed Ventura del Toro in the spring of 1880. Del Toro, Jesus Basques and witness were *en route* from the Medina river to San Antonio, with wood for sale. Within six miles of San Antonio the party met a Mr. Campbell and the defendant in a two horse wagon, going from San Antonio toward the Medina. After the wagons had passed each other some little distance, Campbell's wagon stopped, and witness heard the defendant say that he was going down to the mission. Defendant got out of Campbell's wagon and started off on the lower side of the road in the direction of the mission below San Antonio. Campbell's wagon started on; that of the witness and his party had not stopped, but kept on toward San Antonio. Witness and party had traveled perhaps two hundred yards from where they met Campbell's wagon when the defendant came up to Del Toro, who was riding on the driver's or saddle mule. He asked Del Toro to get down. Del Toro began dismounting, and just as one foot touched the ground, and while the other was still in the stirrup, the defendant shot and killed him.

When witness saw Del Toro falling, he jumped off his wagon and ran. The defendant called to witness, but the witness did not stop, and the defendant fired at him, the ball passing through the left shirt sleeve of the witness above the elbow.



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Witness ran on to the house of Francisco del Toro, the father of the deceased, and told him of the killing of the deceased. Francisco del Toro and the witness returned to the scene of the shooting and found the deceased lying dead, with a bullet hole through his head. This all occurred in Bexar county, Texas, some time in the spring of 1880. The defendant on trial is Escareno, the man who shot and killed the deceased.

Cross-examined, the witness stated that no conversation passed between the defendant and Del Toro before the shooting. The defendant merely went up to the deceased, told him to dismount, and shot him as he was in the act of dismounting. They had no fight before the shooting, and witness did not know why the defendant killed the deceased. Del Toro made no effort to cut the defendant with a knife, nor did he have a knife at the time. There was no road leading to the mission from the place where the killing occurred. Witness was between ten and eleven years old when the killing occurred, and is now fourteen. Witness had not disclosed to any one what his testimony on this trial would be. The fatal shot powder burned the hair on the head of deceased.

Francisco del Toro, the father of the deceased, was the next witness for the State. He testified that the deceased was killed on the sixteenth day of April, 1880. Witness was at his ranch when the killing occurred. Ysidoro Rosas brought the news to the witness. Witness and Rosas went together to the scene of the killing, and found the deceased lying dead, shot through the head. The body was taken home and buried. The witness knew nothing more about the killing of the deceased than he was told.

J. M. Penaloza testified that he was a deputy sheriff of Bexar county, and had held that office for several years. He received a *capias* for the defendant a short time after the killing, and retained it until his arrest. The defendant was hunted vigorously but eluded apprehension until six or seven months before this trial, when he was traced to Hays county. Witness arrested him near Kyle, in Hays county. The defendant was going then under an assumed name, the given name being Pedro. Witness did not learn his assumed surname. At this point the State rested.

L. H. Campbell was the first witness for the defense. He testified that he hired the defendant in San Antonio on the fifteenth day of April, 1880. Next day the defendant came and put a

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rolled up blanket into his, witness's, wagon. Defendant was drunk at that time. He took a seat by the witness in the wagon and they started out of town. The defendant was then apparently in a stupor. He seemed to notice nothing, but slept until they had traveled about six and a half miles, when they met Basques, Rosas and the deceased. Witness told defendant there was "Pedro." He looked up; the boy turned his head and drove on. As witness and defendant passed the wagons, a man who was walking behind the hindmost wagon looked up toward the defendant and said something about "cabron." Witness did not know to whom he applied this epithet, but he was looking toward the defendant. (It was conceded that "cabron" means a man who consents to the prostitution of his wife.) Witness drove on about fifty yards, when the defendant caught the lines from his hands, stopped the team and said something about "mission" or "permission." Witness saw that he wanted the team stopped, and assented. Defendant then went to the rear of the wagon, unrolled his blanket and took therefrom his six shooter, which he buckled around his waist. He then replaced his blanket in the wagon. Up to this time the witness did not know that defendant had a pistol. After buckling on his six shooter the defendant went to the other side of the wagon, took up his provision sack, from which he procured a piece of bacon, and offered it to witness. Witness declined it, and the defendant then laid it in the wagon and went off into the brush, on the lower side of the road and in the direction of the mission. Witness saw no more of him, but in a short time heard two reports of a pistol. It was the man who was walking in the rear of the wagon who used the word "cabron." The witness did not know whether or not that man was the deceased.

Cross-examined, the witness stated that he did not see the shots fired, as he had then passed out of sight. They were fired back on the road over which witness had just passed. They were not fired in the direction of the mission. Defendant did not say that he was going to the mission when he stopped the witness's team. No road led to the mission from the point where the defendant got out.

The motion for new trial raised the questions considered in the opinion. It was supplemented by the affidavit of defendant's counsel, setting up, in substance, the following newly discovered evidence: That one Shields, a witness subpoenaed in behalf of the defendant, told affiant after the trial that one Reyes

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Opinion of the court.

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Ojedas, who lived in the neighborhood of the deceased, could and would on a new trial testify that he, Ojedas, knew that the deceased and his family were implicated in the theft of certain horses, and that the defendant had so reported on them, for which reason the deceased and other members of his family had said that they would either kill or run the defendant from the country; that, prompted by the same motive, the deceased, with assistance, enticed the defendant to an unfrequented place, a few weeks before the killing, and beat him violently; and that Shields would testify that other persons with whose names he was not acquainted would testify to the same facts; that Shields would further testify that one Woodruff lived near him; that he told the deputy sheriff, Penaloza, who had a subpoena for Woodruff, where he, Woodruff, lived, and proffered, if deputized, to serve a subpoena on Woodruff and have him in attendance upon court, but that said deputy sheriff Penaloza declined to so deputize him. Affiant further affirmed that he was led to believe by the deputy sheriffs to whom he gave subpoenas for Woodruff, that Woodruff had left the country, wherefore he did not, as he otherwise would have done, ask for a continuance.

*G. W. A. Brantley*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**HURT, JUDGE.** Appellant was tried and convicted of the murder of Ventura del Toro, in Bexar county. He was convicted of murder of the first degree and his punishment was assessed at death. Judgment being entered up on the verdict, and his motion for new trial being overruled, he appeals to this court.

For a reversal of the judgment, the following assignments of error are made by counsel for appellant:

1. "The court erred in not charging the jury the law applicable to manslaughter."

2. "The court erred in not causing the verdict translated to defendant, he not being able to understand the English language, as record shows; in which the verdict of the jury was written, and read in open court."

3. "The court erred in overruling the fifth ground of defendant's original motion for a new trial, as will more fully appear from the record."

4. "The court erred in not having the defendant himself

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present in court at the time of the hearing and overruling of defendant's motion for a new trial, the same having been waived by counsel instead of by the defendant himself, as the law requires."

First assignment: Did the evidence, or any evidence, adduced on the trial require of the court a charge upon manslaughter? If there was evidence requiring such a charge, the omission being complained of first in the motion for new trial, were the rights of defendant injured, or was the omission calculated to injure his rights?

If manslaughter be in this case, it is so solely by reason of the following evidence: Ysidoro Rosas, Venturo del Toro and Jesus Basques were going from Medina to San Antonio with wagons loaded with wood. When within about six and one-half miles of San Antonio they met Mr. Campbell and defendant in a wagon going in the direction of Medina. After the wagons had passed each other, Campbell saw a man walking behind the hindmost wagon of the company, going to San Antonio. This man looked up toward the defendant and said "cabron." (It is admitted that "cabron" means a man who consents to his wife's prostitution.) Campbell drove on about fifty yards, when defendant caught the lines and stopped the team, and said he was going to the mission. He got out of the wagon, went to the rear and took his pistol from his blanket, and buckled it around him and entered the brush on the same side of the road. The deceased and his party had got on about two hundred yards, when defendant overtook them, asked the deceased to dismount, and while in the act of dismounting—with one foot on the ground and the other in the stirrup—the deceased was shot by the defendant through the head and instantly killed.

Now it is urged by counsel for defendant that the word "cabron" was an insult to his wife, and that, if the killing was induced by this, it would not be murder, but manslaughter, and that therefore the court erred in failing to charge the law relative to this matter, contained in the fourth subdivision of Article 597, Penal Code.

It must be borne in mind that there was no objection to this omission, nor instructions asked supplying the alleged defect. But the vital question presented by the statement of facts is whether or not the deceased was the person who spoke the insulting words. If not, certainly defendant cannot complain of

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this matter. And the rule being that when there was no objection made at the time, nor the omission sought to be cured by requested charges, it must be made to appear to this court that the error or omission was calculated to injure the rights of the defendant. Looking to the record in this case, does it appear to us that the omission in the charge complained of was calculated to injure the defendant? If it appeared from the evidence that Venturo del Toro (the deceased) was the person who used the word "cabron" to defendant just before the homicide, this being an insulting word toward a female relative of defendant, it would be made apparent that the court should have charged the law relating to this matter. But how can we say and rule that the omission was not only error, but such error as was calculated to injure the rights of the defendant, when the proof fails to show that it was the deceased who spoke the insulting words? The injury must appear, manifest itself, and not be assumed by this court.

But in fact and reality was this insulting language toward defendant's wife the true cause of this homicide? Let us look a little further into this record. In his motion for new trial appellant swears that upon another trial he will prove by certain witnesses that Del Toro and his friends had threatened to run him out of the country or kill him. It is not stated in this motion nor the supporting affidavit that Del Toro or any of his party did any act whatever tending to show any intention to execute these threats. If the facts were all established upon another trial, as set forth in the motion for new trial, nothing less than a homicide instigated purely by revenge would be developed by or result from these facts.

Here then we have, no doubt, the moving and real cause of this calm, cool and deliberate homicide. It was not prompted by the insult to his wife, but by a wicked desire for terrible and bloody revenge, growing out of quite another matter. Looking then to the whole record in the case, it does not appear to us that the omission in the charge complained of was calculated to injure the rights of defendant, or that for this supposed error the judgment will be reversed.

The second and fourth assignments of error will be considered together. We are not informed by the record whether the verdict of the jury was translated into the language of the defendant or not. There is no bill of exceptions reserved. Certainly, then, this court will not proceed upon the assumption that every-

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thing stated in the motion for new trial is true; nor are we to be understood as intimating that this was necessary.

These observations apply also to the fourth assignment. It does not affirmatively appear from the record that defendant was not present when his motion for new trial was overruled, nor does it affirmatively appear that he was present. We therefore presume that he was present, as the presumption is in favor of the legality of all the steps taken in the case. But suppose the record shows affirmatively that he was not present when his motion for new trial was overruled, in the assignment of errors it is conceded that this right was waived by his counsel. The question then is, is defendant bound by this waiver? What is the presumption? It is that his counsel was authorized by defendant to make the waiver, and that defendant is bound by it unless he shows that in fact he did not so authorize it.

These are nice questions, and we allude to them for the purpose of calling the attention of the trial judges to the necessity of keeping the records purged of all such matters. Why will the learned judges presiding hazard well deserved and otherwise certain punishment upon a decision of such questions? questions which have a place in the record not of necessity, but by reason of inexcusable negligence and indifference to the solemn proceedings made necessary by the Code to be pursued, in order to the due and proper administration of the criminal laws and the certain punishment of those who are guilty of their violation.

If a citizen is placed upon trial for felony, and especially for capital felony, it is the duty and should be the aim of the trial courts to make the record affirmatively show that each and every step necessary to a due and legal trial has been made or taken, and the greatest caution should be used to keep the record clear of all doubtful questions of practice. There being nothing in the record showing that defendant was not present when his motion for new trial was overruled, this assignment is not well taken.

By reference to the fifth ground urged in the motion for new trial, it will be found that an explanation or reason is therein sought to be given to excuse the supposed negligence of defendant's counsel in not having certain witnesses served with process. To this matter the third assignment refers. As we have stated above, the facts which appellant swears he expects to establish by these witnesses would not, if true, tend to justify,

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extenuate or mitigate the offense or killing. On the contrary, they would, as presented to us by the record, tend with great force to prove a homicide upon express malice. This being the case, the court below did not err in refusing a new trial.

Counsel for defendant does not insist in his assignments of error that the verdict of the jury is not supported by the evidence. In this we commend him, for to our minds this unfortunate man is clearly shown by the evidence to be guilty of premeditated and deliberate murder. We have examined all the assignments of error, as well as the grounds relied upon for a new trial, and find nothing in this record which would authorize the reversal of this judgment. The judgment is affirmed.

*Affirmed.*

Opinion delivered April 30, 1884.

[No. 3073.]

## LOGAN HOWELL v. THE STATE.

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36	495
36	638

1. PRACTICE—CIRCUMSTANTIAL EVIDENCE—CHARGE OF THE COURT.—Where the State has to rely exclusively upon circumstantial evidence to secure a conviction, it is incumbent on the trial court to give in charge to the jury the law controlling such evidence.
2. ACCOMPLICE TESTIMONY—CHARGE OF THE COURT.—When the testimony of a State's witness tends to implicate him as a *particeps criminis*, or an accomplice in the offense, it is the duty of the court to give in charge the law regulating such evidence, and to refuse a correct charge asked upon the question is fatal error. See the opinion for evidence held to implicate a witness as an accomplice.
3. THEFT—POSSESSION OF RECENTLY STOLEN PROPERTY—BURDEN OF PROOF.—Where the State, in a theft case, relies upon the defendant's possession of recently stolen property as an inculpatory fact, the defendant is entitled to prove his explanation of his possession made at the time his possession was first challenged, and if such explanation be reasonable the *onus* of disproving it is imposed upon the State. In this case the defendant attempted to prove a conversation with a witness for the purpose of getting his explanation before the jury, but was not permitted to do so. But *held*, that, inasmuch as the bill of exceptions reserved to this ruling fails to disclose the conversation or its materiality, this court cannot revise the action of the court below in this matter.

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Statement of the case.

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APPEAL from the District Court of Bexar. Tried below before the Hon. G. H. Noonan.

The indictment charged the appellant with the theft of twenty-four and a half dollars, the property of S. J. Harland, in Bexar county, Texas, on the twelfth day of August, 1883. Upon trial the appellant was convicted, and was awarded a term of two years in the penitentiary as punishment.

S. J. Harland was the first witness for the State. He testified that on the twelfth day of August, 1883, he was engaged in the business of keeping a bar saloon, on Laredo street, west of the San Pedro creek, in the city of San Antonio. About two o'clock on the morning of that day the witness closed his saloon, counted his money, placed the same in his pocket book and went to bed. He slept just outside of his back door, in the yard, under a small gallery. He adjusted his cot under this gallery, and just before going to bed he placed his pocket book, containing the money, under the head of the cot. Witness counted the money before he put it in the pocket book. It amounted to twenty-one dollars, besides some loose change.

After the witness had been some little time in bed some customers came to the saloon, and the witness got up and waited on them. In payment for the beer they ordered and received they gave the witness a five dollar gold piece. Witness returned the change in silver, taking the change from the pocket book and depositing the five dollar gold piece in the pocket book. After these customers left the witness returned to his cot, and again placed his pocket book under his head and went to sleep. At this time the pocket book contained something over twenty dollars, consisting of one five dollar gold piece, six or seven one dollar silver pieces, eighteen or twenty half-dollar silver pieces, and a number of fractional silver pieces of the denominations of dimes and half-dimes. Witness did not know the exact aggregate amount, but it was fully twenty-one dollars, was the property of the witness, and was taken without the knowledge or consent of the witness.

Witness got up next morning, folded his cot, set it away, went into and opened his saloon. He then missed his pocket book and money, and went back to the place where he had slept to hunt for it, but could not find it. At the time that the witness got up he saw the defendant in the back yard near the place where the witness slept. When the witness went out to



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Statement of the case.

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look for his money the defendant was gone. Witness recovered eight dollars of the money that evening. Witness had been making inquiries for the money, and that evening Albert Bigger came to him, gave him eight dollars, and told witness how, when and where he got it. Acting upon information thus obtained, the witness had the defendant arrested. This all occurred in Bexar county, Texas, on the morning of August 12, 1883.

Cross-examined, the witness stated that he could not say exactly what amount of money he lost. It was about twenty-one dollars, no less and probably a little more. Several tenant houses are located in the yard back of witness's saloon, and the yard is a common yard. A card playing or gambling house is also situated on that back yard. This yard or place is known as the "corral." Parties passing from that yard to Laredo street pass through witness's saloon when it is open. The west door of the saloon opens on that yard. A person can pass westward through the yard and reach East street, or the street west of and parallel with Laredo street. A great many people are in and about that yard, passing in and out at nearly all hours of the day and night. Witness did not see who got his money. His first information concerning it came from Bigger, when the latter returned the eight dollars. The witness did not know of his own knowledge that the defendant ever had or saw that money.

Albert Bigger was the next witness introduced by the State. He testified that he was acquainted with S. J. Harland and knew where Harland kept his beer saloon on August 12, 1883. Early one morning in August, 1883—he did not recollect the day of the month—witness was in the yard behind Harland's saloon, and saw the defendant there. The defendant was walking away from the place where Harland was sleeping when the witness first saw him. Witness's attention to him was first attracted by the rolling of money, which seemed to have fallen. Witness looked up and saw that the defendant was in the act of stooping. He did stoop and appeared to pick something up from the ground. Witness asked him what he had found. Defendant shook his head at witness and walked off. Witness then said to him: "You must whack up." He replied: "All right; come on." Witness went with him. After they had gone some distance on the street defendant said that he had got some money, and gave witness eight dollars—seven one dollar

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Statement of the case.

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and two half-dollar pieces. Witness took the money home and handed it to Caroline Fielder, with whom he was boarding, and told her to put it away, as an owner for it might be found. In the evening witness learned that Harland had lost the money, and he went and got the money and gave it to Harland.

Cross-examined, the witness stated that he did not know how much money the defendant picked up. He gave the witness eight dollars only, saying that it was half. This was early in the morning, about sunrise. A number of tenant houses stand on the yard in the rear of Harland's saloon. That yard was used as common ground. A gambling house also stood in the yard. A great many persons are to be found in that yard, walking about and going in and out at all hours of the day and night. The witness thought that the defendant had found some money that some one had lost, was the reason he told defendant to "whack up." The eight dollars given him by the defendant the witness delivered to Harland before any arrest was made or any prosecution was instituted. Harland made affidavit against defendant after the witness gave him the eight dollars. On the day after witness gave Harland the eight dollars the defendant was arrested. At this point the State closed.

Anderson Harris was the first witness introduced by the defendant. He testified that he was a police officer on the twelfth day of August, 1883, when Mr. Harland lost his money. The warrant for the arrest of the defendant was placed in the hands of the witness for execution. Witness arrested the defendant.

L. H. Byrn was the next witness for the defense. He testified that he knew the defendant, had known him for five or six years, and at one time had him hired. He knew that the defendant's reputation for honesty in the community in which he lived was perfectly good.

Cross-examined, the witness stated that he had never heard any one discuss or say anything about the defendant's character for honesty. The witness testified only as to what he knew. The witness knew nothing about this charge.

Mrs. B. Porter testified, for the defense, that she knew the defendant, and once had him in her service. She knew nothing about his reputation for honesty, but his conduct in that regard while in her employ was beyond reproach.

The charge of the court, the refusal of charges asked, and the insufficiency of the evidence to support the conviction, were the errors assigned in the motion for new trial.

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Opinion of the court.

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No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** 1. There is no direct evidence in the record that the defendant committed the theft: No witness saw him take the money charged to have been stolen, and he did not confess that he had taken it. Circumstantial evidence alone is relied upon to establish defendant's guilt. This being the case, the court should have instructed the jury in the rules applicable to that kind of evidence. No such charge was given, and therefore the court failed to give the jury the law applicable to the case. (*Lee v. The State*, 14 Texas Ct. App., 286; *Dovalina v. The State*, 14 Texas Ct. App., 312.)

2. It was contended by the defendant that Bigger, the principal witness for the State, was an accomplice in the theft. We think the testimony of this witness tends to show that he was an accomplice. He states that he was present when the defendant picked up money near the place where the alleged stolen money had been left; that he told the defendant he must "whack up," that is, divide the money with him; and that defendant gave him a part of the money, which he, witness, afterward returned to the alleged owner. We think, upon this witness's own testimony, the issue was fairly presented whether or not he was an accomplice in the theft. No other witness saw the defendant with any money. Bigger unquestionably knew that the money did not belong to the defendant, and yet he demanded a division of it, and received a portion of it. If his own statements be true, he was himself a *particeps criminis* to the extent, at least, of receiving stolen property, knowing it to be stolen. We think the evidence demanded that the issue thus raised should be submitted to the consideration of the jury, under proper instructions from the court. This was not done in the charge of the court, and special charges requested upon the subject by defendant's counsel were refused. In refusing the charge upon accomplice testimony, with reference to the witness Bigger, we think the court erred. (*Sitterlee v. The State*, 13 Texas Ct. App., 587; *Clark's Crim. Law*, p. 552, note 224.)

3. Defendant proposed to prove by a witness that, just before, he was arrested upon the charge of the theft of the money, he had a conversation with the witness in regard to finding some money at the place where the alleged stolen money was

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lost. We are not informed by the bill of exception taken to the ruling of the court rejecting this proposed evidence, what the conversation was, and we are therefore unable to determine the materiality of it. If, in that conversation, the defendant, for the first time, gave an explanation of his possession of the alleged stolen money, and such explanation was reasonable, and not shown to be false, it would have been material to his defense, and would have been admissible in his favor. (*Sitterlee v. The State*, 13 Texas Ct. App., 587.) Where, in a prosecution for theft, the State relies upon the defendant's possession of recently stolen property as an inculpatory fact, any explanation given by the defendant, when his right to the property is for the first time called in question, respecting his possession of it, is admissible in evidence in his favor; and if such explanation be reasonable and exculpatory, the State is charged with the onus of proving the falsity of it, before such possession can, of itself, be held criminative of the accused. (*Anderson v. The State*, 11 Texas Ct. App., 576.) But, as before stated, the bill of exceptions does not state facts sufficient to enable us to determine whether or not any error was committed by the court in rejecting the proposed testimony. (*Davis v. The State*, 14 Texas Ct. App., 645.) Our object in noticing this question is to call attention to the rules governing the admissibility of such testimony, in case the same should be sought to be introduced on another trial of this case.

Because the court failed to instruct the jury as to the law applicable to the case, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 3, 1884.

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[No. 2878.]

G. J. SPEAR v. THE STATE.

1. PRACTICE CONTINUANCE—BILL OF EXCEPTIONS.—Objection that the trial court erred in refusing an application for a continuance must be presented by bill of exception. Otherwise, the question will not be considered by this court.

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Statement of the case.

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2. **SAME—PRESENTMENT OF INDICTMENT.**—Under the Revised Code (Article 415, Code of Criminal Procedure), it is not required that the entry on the minutes of the court of the presentment of the indictment should show the offense charged. See the statement of the case for an entry of the presentment of an indictment which, being sufficient, no amendment of it was necessary.
3. **SAME—JURY LAW.**—When, upon his *voir dire*, a proposed juror answers that there is established in his mind as to the guilt or innocence of the defendant a conclusion that will influence his verdict, he should be peremptorily discharged. Such an answer is not only a ground of challenge for cause, but is an absolute disqualification. See the opinion *in extenso* on the question.
4. **SAME—PRIVILEGE OF COUNSEL.**—See the opinion *in extenso* for remarks of State's counsel, in argument, *held* not to amount to an abuse of privilege.
5. **SAME—EVIDENCE—ENFORCEMENT OF "THE RULE" AS TO EXPERT WITNESSES.**—Professional physicians being called to testify solely as medical experts, it was proper to exempt them from the operation of "the rule." Moreover, the enforcement of the rule as to the sequestration of witnesses is matter largely committed to the discretion of the trial judge, and one which will not be revised unless injury to the defendant is made manifest.
6. **MURDER.—CHARGE OF THE COURT,** in a murder trial, instructed the jury as follows: "If you believe from the evidence that a man was killed, yet unless the evidence of his identity as being Nathan Wurmser satisfies you that it was Nathan Wurmser, you will acquit. In determining this identity you will consider the entire evidence, and the attendant circumstances." It is objected that this charge did not confine the jury to the evidence, but authorized them to look beyond it to attendant circumstances. *Held*, that the charge of the court is not to be so construed.
7. **SAME—EVIDENCE—FACT CASE.**—See the statement of the case for circumstantial evidence *held* sufficient to support a conviction for murder in the first degree.

APPEAL from the District Court of Blanco. Tried below before the Hon. L. W. Moore.

The indictment charged that the appellant did, in the county of Blanco, State of Texas, on the eighth day of August, 1879, of his own express malice aforethought, kill and murder one Nathan Wurmser, by striking the said Nathan Wurmser certain mortal blows on the head, with a deadly weapon, the name or character of which was to the grand jurors unknown. The appellant was brought to his trial at the September term, 1883, of the Blanco county district court, was convicted of murder in the first degree, and his punishment affixed at a life term in the penitentiary.

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Statement of the case.

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William Morris was the first witness introduced by the State. He testified that he lived in Cooke county, Texas. He knew the defendant and a man named Wurmser, both of whom lived in Cooke county in the year 1879. The defendant and Wurmser left the witness's house, in Cooke county, Texas, about the first day of April, 1879, to make a trip to southwest Texas. They left together, traveling in a wagon drawn by a pair of mules. They took with them, also, a small dun pony about thirteen or thirteen and a half hands in height. They had in the wagon several sacks of flour, some tobacco boxes, and a number of other boxes, the contents of which were unknown to the witness. They had with them, also, a show case filled with notions. All of this property belonged to Wurmser, and the defendant had no interest whatever in any part of it that the witness was aware of. Witness had never seen Wurmser since the day he left the witness's house, in Cooke county, in April, 1879.

About the last day of August, or the first day of September, 1879, the defendant returned to the witness's house, alone. He brought with him a hack drawn by a roan horse and a sorrel mare. He had with him, also, the dun pony that belonged to Wurmser, and which he and Wurmser took off in April preceding; also, a saddle that belonged to Wurmser, and which was taken along when he and Wurmser left Cooke county. The defendant told the witness that Wurmser became dissatisfied and left him at Fort Concho, to go with a party to Mexico; that Wurmser took his mules and wagon with him, and left him, defendant, the pony on his wages. The witness had known the defendant about three years, in August, 1879, and Wurmser about one year. When the defendant first came to the witness's neighborhood, he taught a five months' school. He followed no particular business after he gave up his school. When he, defendant, first came to that neighborhood, he dressed elegantly, but at the time he left, and for some time previous, he dressed poorly. Wurmser was a German peddler, who had been merchandising in the section of country including and adjacent to the witness's neighborhood for about twelve months. Witness did not know how much money he had. He was a low, heavy set man, broad shouldered, full chested, and about five feet six or seven inches in height. His hair was of auburn color—between a red and black—was generally kept close cut, and was inclined to curl. Defendant had sore eyes, both when he left and when he returned to witness's house. The distance between

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Blanco and Cooke counties is about four hundred miles, and it would take a person, in a two horse hack, ten or fifteen days to make the trip.

Cross-examined, the witness testified that the defendant brought nothing back to Cooke county that had belonged to Wurmser, that witness saw or knew of, except the dun pony and the saddle. The saddle was worth no more than three or four dollars. The defendant went direct to the witness's house when he returned from his southwestern trip, and remained at witness's house for some time, and assisted the witness to make hay. Defendant broke his hack down before he got to witness's house, and left it. Witness went back with him for it. He, defendant, and witness's wife traded hacks, the agreement being made in the trade that the witness should pay for the repairs on defendant's hack. The defendant had no money when he returned, that he, the witness knew anything about. Witness received information, while the defendant was at his house, that the defendant was suspected of the murder of Wurmser. Upon receiving this information, the witness and his wife searched among defendant's things for any article that might have belonged to Wurmser. They searched through his trunk, which was opened with a key that belonged to witness's wife. They found nothing they could identify as having belonged to Wurmser. In the defendant's trunk were two or three new overshirts, three or four undershirts, and some other articles. He, defendant, had a pair of gray pants, which he said he bought in Austin. The pants were too long for him, and when he put them on to wear to a picnic on one occasion, Mr. Vance pinned them up in witness's presence.

Ed. Gibbs was the next witness for the State. He testified that he was a resident of Cooke county, Texas, and resided there in 1879. He knew the defendant; knew him in 1879, and in that year knew one Nathan Wurmser. He saw the defendant and Wurmser when they left William Morris's, in Cooke county, to go to west Texas together, in 1879. Wurmser had a wagon, a pair of mules and a small dun pony. The defendant had no property that the witness knew anything about. It was the understanding that Wurmser was going to west Texas on a peddling expedition, and that the defendant was to accompany him. Wurmser had been merchandising in the witness's neighborhood, in Cooke county, for some little time. On his last trip to that neighborhood, he had about one thousand dollars worth

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Statement of the case.

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of stock, which he sold out before he started on his trip to the southwest. Witness had never seen Wurmser since he left Cooke county, in April, 1879. The witness saw the defendant on the morning after he got back to Cooke county. This was about the last of August or first of September, 1879. He then had a roan horse, a sorrel mare, a hack, and the dun pony Wurmser had taken off with him. Witness asked defendant how he came by that property, and defendant told him that he taught a writing school and earned some money, and won the other money, gambling, with which he purchased it. Some days after this, the witness saw the defendant and other parties gambling in Morris's horse lot. Defendant lost what money he had with him, and went to the house to get more money. He returned shortly with a roll of greenback money half as large as a man's wrist. From this roll he took a ten dollar bill. Witness did not observe the denominations of the other bills. Defendant dressed well when he first came to the neighborhood and taught school. He had some money at that time. After he quit teaching, he took to drink and gambling. When he left with Wurmser, he was shabbily dressed. When he came back, he was well dressed, continued to dress well as long as he remained, and appeared to be well supplied with money. After he came back, the defendant traded his two horses with the witness's brother, receiving twenty-five dollars in money as boot.

J. P. Cross was the next witness for the State. He testified that he resided in Cooke county in 1879. He then knew the defendant and Nathan Wurmser. Wurmser lived at the house of the witness for about ten months prior to his leaving Cooke county for southwest Texas. On the eighth day of April, 1879, the witness left his home in Cooke county on a trip to west Texas in search of a ranch. When the witness left home, Wurmser and defendant were both in Cooke county, but were making preparations for the trip they subsequently left to make. Wurmser had been merchandising for about a year in that neighborhood. Witness in that time had made many purchases for him, and in casting up accounts for a settlement a few days before witness left on his trip west, the account showed a balance in favor of Wurmser for twenty-eight and a half dollars, for which the witness executed his due bill and gave to Wurmser. Wurmser was a German, about five feet six or seven inches high, heavy set, with dark curly hair, cut short. He had



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a dark beard, and was from forty to forty-five years old. His teeth were somewhat peculiar, the front teeth being much protruded. There was a space between the two front teeth large enough to admit the passage of a knife blade. The tooth in front of and next to the eye tooth on the left side had been extracted by Doctor Ing while Wurmser lived at witness's house.

The defendant is a tall and slender man, is about six feet high, has dark hair and mustache, and stands very erect. His eyes were sore when he left Cooke county in 1879. If the defendant had any property when the witness left Cooke county in April, 1879, witness had never heard of or seen it. The defendant taught school for the first five months after he came to the neighborhood, and during that time dressed well. He was without regular employment for some time before he left with Wurmser, and during that time he dressed poorly. During this latter time he drank and gambled a great deal. For a short time he worked at a cotton gin for the witness. When he went off with Wurmser he was poorly dressed and had no property.

When he lived at witness's house Wurmser owned a small dun pony, a silver watch and a hair watch chain. The defendant returned to Cooke county late in August or early in September. He then had in his possession a hack, a sorrel mare, a roan horse, the dun pony, and a saddle which Wurmser owned when he lived at witness's house. The witness also saw in the defendant's possession, a day or two after his return, a silver watch and hair watch chain which he took to be the same Wurmser owned when he lived in Cooke county. The defendant, when he returned, was well dressed and had some money. Witness had a conversation with defendant about Wurmser. He told the witness that Wurmser had gone to Mexico; that he, defendant, taught school, and with the money thus earned bought the property he brought back with him. At another time he told witness that he got into a game with Wurmser and won some of the property. At another time, shortly after the defendant's return, witness saw him wearing a pair of pants that witness took to be a pair of pants that Wurmser had owned when he lived at witness's house. They were smooth gray pants. Defendant had the legs stuck into his boots when witness saw him wearing them. They were so much too short for the defendant that they would not stay in, but continually worked out of the boots. On the twenty-second day of October, 1879, the defendant presented to the witness for payment his, wit-

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ness's, due bill to Wurmser. Witness paid it, and the defendant receipted the same on the back. This instrument was produced in evidence, and read as follows:

“SADDLER'S BEND, COOKE COUNTY, TEXAS,

“April 2, 1879.

“Due N. Wurmser the sum of twenty-eight dollars and fifty-two cents, \$28.52, for value received.”

The witness testified that he had torn off his signature.

This instrument was receipted on the back as follows:

“Received of J. P. Cross, payment in full. This 22d day of October, A. D. 1879.

(Signed)

“G. J. SPEAR.”

Cross-examined, the witness could not swear that the gray pants worn by the defendant on the occasion spoken of were the identical pants he saw previously in the possession of Wurmser. He had no recollection of seeing the defendant at a picnic wearing those pants. The pants he had seen in the possession of Wurmser before he left Cooke county, and which he took to be the same pants the defendant wore on the occasion referred to, had been worn occasionally by Wurmser while he lived at witness's house. The watch which the witness saw in the possession of the defendant after he returned to Cooke county was a watch which the defendant at one time owned, and had traded to Wurmser for a shot gun and some little money in boot—witness did not know how much, but it was only a few dollars. Witness did not know that Wurmser had paid defendant this boot money before they left Cooke county. Defendant had the shot gun a few days before he and Wurmser left Cooke county, but the witness did not know whether or not he took the gun with him. He did not bring the gun back. The defendant clerked for Wurmser some time before the two went off on their southwestern trip. Witness was not at home when defendant and Wurmser left, and consequently knew nothing about what they took with them. Defendant told the witness that Wurmser gave him the due bill in settlement.

H. Henigen was the next witness introduced by the State. He testified that he was a resident of Cooke county, Texas, in the year 1879. He knew the defendant, and he knew Nathan Wurmser. When the defendant returned to Cooke county from the southwest in August or September, 1879, he had with him a sil-

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ver watch and a hair watch chain, which the witness recognized as articles that Wurmser owned and took with him when he left Cooke county. The defendant also had a pistol which the witness recognized as a pistol that Wurmser owned and took with him when he left Cooke county the preceding April. The defendant told the witness that he got the watch, chain and pistol from Wurmser. Witness had never seen Wurmser since he left Cooke county in company with the defendant in April, 1879. Defendant had no property when he left Cooke county with Wurmser, in April.

Cross-examined, the witness testified that the pistol referred to was a pocket weapon. Speaking to witness about it, the defendant told him that Wurmser purchased a larger pistol for himself, and gave this one to him, as a present. He told the witness that he got the watch from Wurmser, but if he told witness how, or by what kind of a transaction, the witness had forgotten it. The witness was of opinion that the defendant had once traded that watch to Wurmser. The witness did not remember that the defendant told him, at any time, that he had traded the watch to Wurmser for a shot gun and four dollars, and that Wurmser failed to pay the four dollars, and that they cancelled the trade by resuming their respective properties.

William Bluitt next testified, for the State, that he lived in Cooke county in 1879. He knew that the defendant and Nathan Wurmser left that county together. The witness had a distinct recollection of the defendant's return to that county. He brought back with him a pistol which the witness thought he recognized as one owned by Wurmser before he left Cooke county. Witness asked defendant about the pistol, and defendant said that Wurmser gave it to him.

Emil Herrman was the next witness for the State. He testified that during the year 1879 he was working in a livery stable in the town of Blanco. One day, two men drove up to the stable in a hack, and purchased some corn and top fodder from the witness. One of these men was tall and slender, the other shorter and heavy set. The tall man had dark hair and whiskers; the shorter man had light hair and whiskers. The witness took the short man to be a foreigner, as he spoke with a brogue. The hack was drawn by two horses. A small dun pony, in very bad order, was tied to and led behind the hack. The occupants of the hack inquired the way to San Marcos. The witness gave them directions, and they started off from the sta-

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ble in the direction of San Marcos. The witness did not remember the time of day when the men were at the stable. About a week or ten days after these men were at the stable, the witness heard of the discovery of the body of a dead man on the Little Blanco river. Witness could not swear that the defendant was one of the men who stopped at the stable and purchased the corn and fodder. He could not say that he resembled either of them.

The next witness for the State was G. W. Palmer, who testified that he lived in Blanco county. On the eighth day of August, 1879, the witness was on his return home from the city of Austin. On the Blanco and San Marcos road, about a mile from where that road crosses the Little Blanco river, he met two men driving a hack drawn by two horses, one a roan horse, and the other a sorrel mare. They stopped the witness, and asked him to direct them to a good camping ground on the road. Witness directed them to cross the Little Blanco river; that a little above the crossing they would find good water, and a little below they would find good grass and a good camping place. Witness offered to trade horses with them, but they declined, saying that their team worked well together, and they would keep them. One of these men was tall and slender, about six feet in height. The other was a lower and heavier set man, with dark hair and beard. He was about five feet six or eight inches high. This was only the witness's opinion, as he did not see him stand up. He and the tall man were sitting in the wagon together, the tall man driving. Witness had no conversation with the short man, but, from his appearance, took him to be a foreigner. The tall man wore a mustache and chin whiskers, a shade lighter in color than the short man's. The witness positively recognized the defendant as the tall man who was driving the wagon, and with whom he had the conversation detailed. Witness was absolutely certain that the defendant and the tall man were one and the same. Witness noticed the tall man's eyes, but not the color of them. He had sore eyes, one much sorer than the other.

When the two men started on, after the conversation detailed, the witness noticed that they had a small dun pony tied behind the wagon. Witness had not seen this pony before, because it was grazing on the side of the hack opposite to where witness stood. The pony got one foot over the rope, to which fact the witness called the men's attention, when one of them got out

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and relieved it. Witness never saw that man—the tall man whom he recognized as the defendant—afterward, until he was brought back to Blanco county in June, 1883. Witness then saw him and instantly recognized him as the tall man he saw and conversed with as stated, on the Little Blanco river, on the eighth day of August, 1879. It was late in the evening, about an hour before nightfall, when witness met the men. The body of the dead man was found on Little Blanco river, one week from the day after the witness met the two men in the hack as deposed to. A heavy rain fell about midnight on the night of the day on which witness met the parties described.

Cross-examined, the witness stated that his conversation was conducted with the tall man altogether; and that man he positively identifies in the defendant. He did not hear the other man speak at all. The tall man merely said that he did not want to trade horses; that while his did not match in color, they worked well together, and he would not separate them.

Ben. F. Palmer testified, for the State, that he was the son of the last witness, and was with his father on his return from Austin in 1879, when they met the two parties in the hack on Little Blanco river. Witness did not notice the color of their horses. They had a pony tied behind the hack. While his father was talking to the men, witness saw a little black dog sitting in the back part of the hack.

J. C. Breed was the next witness for the State. He testified that in August, 1879, he lived near Fisher's store, on the road between that point and the city of Austin. The Austin and Fisher's store road leaves the Blanco and San Marcos road at Fisher's store. Witness lived about three hundred yards from the store. The witness heard of the discovery of the dead body of a man on the Little Blanco one Sunday in August, 1879. On Saturday morning, nine days before the witness heard of that discovery, he was up early, feeding and milking his cows. While standing on the road, having temporarily suspended his work, the witness was passed by a man in a hack going toward Austin. He was driving a roan and a sorrel horse to the hack, and leading a dun pony tied to the rear of the hack. The man was tall and slender, and wore dark hair and whiskers—moustache and chin whiskers. Witness was standing immediately in the road, and, as he expected the man to speak to him, noticed him particularly. The man did not speak to witness, nor did he turn his face toward witness. The back curtain of the hack

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was up, the side curtains were loose and flapping, enabling the witness to see into and through the hack. He saw a small black dog, a saddle, some camping utensils and bedding in the hack. Had another man been in the hack at that time, the witness would have seen him, unless he had been lying down perfectly flat and concealed by the bedding. In that way it was possible that a man could have been so concealed in the hack that witness could not have seen him. Witness could not positively swear that the defendant was the man who drove that hack, though he looked very much like him. Daylight was just breaking when the man in the hack passed the witness. He was driving very hard, and seemed to be in great haste. A heavy rain had fallen the night before and the roads were very muddy. About a mile from where the witness saw the man and the hack there was a dim road leading off to the right, and going back into the San Marcos and Blanco road. From the place where the witness saw the man in the hack, back to the crossing of the Little Blanco, on the San Marcos and Blanco road, the distance was about five miles.

Leo Watts testified, for the State, that in August, 1879, about a week before the discovery of the body of a dead man on Little Blanco, he met a man driving a hack drawn by two horses, with a dun pony led behind, traveling in the direction of San Marcos. This was on Saturday or Sunday, a little after sun up; and the point at which witness met him was about four and a half miles from and beyond Fisher's store. Witness was traveling in a wagon. The man turned out of the road, turned his face from witness, and passed without a word. The curtains on the side of the hack next to witness were up, and those on the opposite side and behind were down.

Libe Watts testified, for the State, that in August, 1879, he was on the Little Blanco, stock hunting, at a point about two hundred yards below where the San Marcos and Blanco road crosses the Little Blanco. At that point, the witness found where something had been buried in an old cow trail which led down the bank of the river. Upon examination, the witness discovered the knee and foot of a human being. Witness went forthwith to Blanco City, notified the authorities, and returned with them to the body.

C. L. Pruitt was the next witness for the State. He testified that he was one of the coroner's jury that sat in inquest over the body of a man found on the Little Blanco river, some time

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in August, 1879. The body was found on the banks of the Little Blanco, about two hundred yards below the San Marcos and Blanco City crossing. It was buried in an old cow trail that had washed out, and was covered with dirt, rock, and brush cut from surrounding bushes. This brush appeared to have been cut about six or eight days. The dirt with which the body was covered had been cut from a neighboring bank, the instrument used being, evidently, an ax. Witness and the party with him disinterred and examined the body. The top of the head had been crushed in with a blunt instrument of some kind. The body was that of a stout, heavy set man, of about five feet six or seven inches in height, dark skin, hair and whiskers, the latter wavy and cut short. The tooth next to and in front of the eye tooth, on the left side, had been extracted. The front teeth were larger and longer than the others, and protruded considerably. There was a large space between the front teeth. A place where parties had camped was found near by, and it was discovered that top fodder had been fed to the horses. From the appearance of the ground, it was evident that rain had fallen since the body was buried. The flesh was gone from one foot and knee, and partly from the face. The party buried the body about ten steps from where it was found. The witness, on the day of this trial, pointed out the grave to W. J. Jackson, sheriff of Blanco county.

W. A. Wright, another member of the coroner's jury, testified, for the State, that he examined the ground in the vicinity of the place where the body was found for wagon or hack tracks leading from the road to the camp, but could find none. He did find, however, at the camp hack or small wagon tracks, where the vehicle had stood, and traced it thence into the San Marcos road. The track was that of a hack or small wagon, drawn by horses, and was made during or immediately after a rain.

Doctor W. J. Ing was the next witness introduced by the State. He testified that he resided in Cooke county, Texas, and resided there in 1879. Witness was a practicing physician. He knew one Nathan Wurmser. In March, 1879, a short time before Wurmser left Cooke county, he came to the witness's office, to have a tooth extracted. The witness extracted for him his tooth in front of and next to the eye tooth, on the left side. After pulling this tooth, the witness noticed a very peculiar formation of Wurmser's head, and, for that reason, examined it critically.

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He found that the left side of the head, back of the ear, was deficient and very much depressed, while on the opposite side there was a large projection, as though the skull had been pressed to the right. The right side of the skull, back of the ear, extended one and a half or two inches further from the centre of the skull than did the other side. It was such a skull formation as the witness had never before seen in his active practice of thirty-five years. Another peculiarity about the skull was that it receded remarkably from the eyebrows. This skull was of such peculiar formation that a person examining the head of the living man could have readily recognized the skull after death. Wurmser's upper front teeth were wider and larger than common, and protruded very much. The space between the two upper front teeth was wide enough to admit the passage of a knife blade.

Since the witness's arrival in Blanco county, and during the present term of the court, he had been shown the skull of a human being in the possession of W. J. Jackson, sheriff of Blanco county. The witness examined it critically and minutely, and found that it had all the peculiarities witness observed in the formation of the skull of Nathan Wurmser. The forehead, from the eyebrows, receded very much. The marked depression on the left side of the skull, just as it was on the left side of Wurmser's skull, was there. The upper front teeth of the skull corresponded in every particular with those of Nathan Wurmser. The teeth in the skull were all intact, except the tooth immediately next to and in front of the eye tooth, in the left jaw, which missing tooth had been extracted before death, as shown by the fact that the cavity and the bone had entirely closed up and healed. Upon examination, the witness readily identified this skull as that of Nathan Wurmser. Witness had known Wurmser about a year before he left Cooke county, and, after his first examination of Wurmser's head, had frequently noticed the peculiar formation of his skull.

Doctor Thomas G. Edwards testified, for the State, that he was a practicing physician, resident of Blanco county, Texas. During the present term of the district court, the witness was shown and examined a human skull in the possession of sheriff Jackson. The forehead of that skull receded very much, beginning at the eyebrow. There was a marked deficiency and depression on the left side of the skull, back of the ear, and on the opposite or right side of the skull, back of the ear, there



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was an equally marked convexity. The skull on the right side measured one and a half or two inches more from the centre of the head than it did on the left. Witness had never, in a long professional career, nor in the many museums he had visited from time to time, seen such a peculiar skull formation. This skull was so peculiar in formation that a person who had seen it in life would have no difficulty whatever in recognizing it after death. Witness also examined the teeth. The upper front teeth were larger than common, with considerable space between them, and they protruded very noticeably. The testimony of Doctor A. V. Duncan, a practicing physician of Blanco county, was substantially the same as that of Doctor Edwards.

W. J. Jackson, sheriff of Blanco county, testified, for the State, that the skull examined by Doctors Ing, Edwards and Duncan was taken from the grave on Little Blanco river, shown to witness by the witness C. L. Pruitt.

Lum Johnson testified, for the State, that he was the sheriff of Cooke county, Texas. For several years the witness had in his hands *capiases* from Blanco county for the arrest of the defendant. Witness arrested the defendant some time in June, 1883, in the Indian Territory, where he was living and going under the name of George Johnson. After defendant was arrested, he told the witness that his name was George Johnson Spear, and that he had left off or dropped off the Spear. At this point the State closed.

William Morris was the first witness called for the defense. He testified that Wurmser had auburn hair, and wore it cut short. It was inclined to be curly, and looked rough. The defendant remained at the witness's house in Cooke county after he returned in August, until the next spring. On one occasion the witness saw the defendant wearing a pair of gray pants with raised cords. They were too long for him and were pinned up to shorten them. Defendant told the witness that he bought the pants in the city of Austin.

William Bluettt testified, for the defense, that he knew when the defendant left Cooke county to go to the Indian Nation. The defendant was arrested upon the charge of theft of a pistol, and was taken to Marysville. The officer who arrested him gave him a bond to take down to be signed by sureties. The defendant told the witness that he dared not to stand trial at that time, and that he could not make a bond in Marysville. He then asked witness to get his horse for him, which the witness

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did, and he left. Witness did not see him again until after his arrest upon the charge now being tried. Witness told defendant, one or two days before he went to the Nation, that he was suspected of the murder of Wurmser. This all occurred in August or September, 1879.

John C. Goar testified, for the defense, that he lived in Blanco county, about three miles distant from where the dead body was found on Little Blanco river. Three or four days before the body was discovered, the witness heard some one screaming as if in distress. These sounds of distress came from the direction in which the body was found. The witness thought the screams came from the house of a neighbor, about three-quarters of a mile distant, in the direction of where the body was found. The screaming could not have been as far off as where the body was found, as the witness could not have heard it at that distance. Witness and his wife went out of their house and listened to the cries spoken of. The witness afterward ascertained that the cries did not proceed from the neighbor's house spoken of. He had never heard anything more about the screaming.

Doctor Stips testified, for the defense, that he lived in Goliad county. In August, 1879, a man named Tim Hart left that county (Goliad) to go out to the western counties to buy land. That man had never been seen or heard of since, though diligent search for him had been made. Hart had a large supply of money with him. He was a heavy set man with dark skin, hair and whiskers, and was about forty or forty-five years of age. Hart lived in the town of Papalote, where his wife still lives.

John Robinson testified, for the defense, that he lived in Blanco City in August, 1879. On the day spoken of by Emil Herrman, one of the State's witnesses, the witness saw two men at the stable buying feed. He passed by the two men, but took no special notice of them. He did not know whether or not the defendant was one of those men.

The motion for new trial presented the questions considered in the opinion.

*W. W. Martin* filed an able brief for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** 1. There is no bill of exception in the record

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to the action of the court overruling defendant's application for a continuance, wherefore we will not consider the same. (*Cone v. The State*, 13 Texas Ct. App., 483; *Bohannon v. The State*, 14 Texas Ct. App., 271.)

2. It is not required that the entry upon the minutes of the court of the presentment of the indictment of the grand jury should state the offense charged. (Code Crim. Proc., Art. 415; *Hasley v. The State*, 14 Texas Ct. App., 217.) In this case the original entry of the presentment was in full compliance with the law, and the amendment of the same was unnecessary. It was not error to overrule the defendant's motion to set aside the indictment upon the ground that the presentment thereof had not been properly entered upon the minutes of the court.

3. It was not error for the court to discharge Gid Thorp from the jury. Upon examination as to his qualifications to serve as a juror in the cause, he stated under oath that there was an established conclusion in his mind as to the guilt or innocence of the defendant, that would influence his verdict. Having thus answered, the law says emphatically "he shall be discharged." (Code Crim. Proc., Art. 636, subdiv. 13.) We are of the opinion that when a juror thus answers, it is not only a ground of challenge for cause, but it absolutely disqualifies him as a juror in the case, and it is the duty of the court to stand him aside, whether challenged or not. It is true that in specifying who are disqualified to serve as jurors, the Code does not include one who has thus an established conclusion in his mind (Code Crim. Proc., Art. 631), but makes such conclusion a cause for challenge. We are of the opinion, however, that when the law says, as it does, that when the proposed juror answers affirmatively that there is established in his mind such a conclusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict, *he shall be discharged*, that this is a peremptory mandate, which the trial judge would not be at liberty to disregard, but must of his own motion stand the juror aside. In the formation of a jury, the great object of the law is to obtain jurors who are impartial, who have not prejudged the case, and who are prepared to render their verdict upon the evidence and the law of the case, uninfluenced by any other consideration. This object would not be accomplished if persons whose minds were fixed as to the guilt or innocence of the accused were permitted to serve as jurors. We do not think that the defendant has any cause to complain of this action of

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the court. It does not appear that his rights were in any way injured or prejudiced thereby.

4. We can perceive nothing reprehensible in the remarks of the district attorney complained of, and presented by bill of exceptions. These remarks were made by the district attorney in his argument to the jury, and were as follows: "We are not permitted to exhibit the skull before you. Would to God that you could have that skull before you." This was merely giving a reason why the skull of the deceased was not before them, and expressing a wish on the part of the district attorney that the jury could view it. How these remarks could reasonably be supposed to prejudice the defendant we cannot conceive. It appears from the bill of exception that the court promptly checked the district attorney upon objection made to these remarks, and directed the jury to give no heed thereto. We think this objection without merit and frivolous.

5. Doctors Duncan and Edwards were excused from being placed under the rule as witnesses. They were permitted to testify as experts in the case, after hearing the testimony of Doctor Ing, another witness who testified in the case as an expert. We see no error in this. The enforcement of the rule as to witnesses is a matter largely within the discretion of the trial judge, and his action with respect thereto will not be revised by this court unless it be made to appear that the judge has abused the discretion confided to him. Besides, these witnesses were medical experts, called to testify solely as such, and it was proper practice to not apply the rule to them. (*Johnson v. The State*, 10 Texas Ct. App., 571.)

6. We are of the opinion that there is no error in the charge of the court. That portion of the charge specifically objected to is as follows: "If you believe from the evidence that a man was killed, yet unless the evidence of his identity as being Nathan Wurmser satisfies you that it was Nathan Wurmser, you will acquit. In determining this identity you will consider the entire evidence *and the attendant circumstances*." It is contended that this did not confine the jury to the *evidence*, but permitted them to look outside thereof to *attendant circumstances*. To our minds this is a strained construction of the paragraph, even when considered without reference to other portions of the charge. But, even if this construction could reasonably be placed upon it, when the charge is viewed as a whole, as it should be, it is manifest that the jury were in-

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Syllabus.

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structed that they must look alone to the evidence before them in considering the issues to be found. We think the charge of the court is in all respects unobjectionable, and could not have been misunderstood by the jury.

7. In regard to the sufficiency of the evidence to support the conviction, we must say that we have never known a case where in guilt was more conclusively established by circumstantial evidence. We commend the able district attorney who conducted this prosecution for the great care and consummate skill exhibited by him in developing so thoroughly and satisfactorily the numerous links constituting the complete chain by which deserved punishment will be fastened upon the defendant for committing the meanest of all murders, a murder the motive of which was to possess himself of his victim's property.

The judgment is affirmed.

*Affirmed.*

Opinion delivered May 3, 1884.

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[No. 3088.]

## BILL TRIMBLE v. THE STATE.

1. ROBBERY—ARREST OF JUDGMENT.—INDICTMENT for the offense of robbery which pursues, substantially, the common law precedents for that offense is sufficient. It is not, however, always sufficient to charge an offense in the exact words of the statute defining it, the rule being that the facts constituting the offense must be alleged by direct, positive and certain averments, and not by way of argument or inference. Failing to allege that the party robbed was the party assaulted by the defendant, and put in fear of his life or bodily harm, the indictment, in this case, is insufficient, wherefore the motion in arrest of judgment should have prevailed. See the opinion *in extenso* on the question.
2. EVIDENCE—MOTIVE.—In a trial for robbery, the prosecuting witness was asked, upon cross-examination, if he did not, just before the institution of the prosecution, have a conversation with the defendant regarding the latter's knowledge of an alleged incestuous intercourse between the witness and his niece. *Held*, admissible on the question of the *animus* of the witness, for which reason, as shown by the bill of exceptions, the question was propounded; and the trial court erred in refusing to require the witness to answer.

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8. **SAME—NEW TRIAL.**—See evidence *held* insufficient to establish guilt beyond a reasonable doubt, and newly discovered evidence of such character as to have authorized and required the award of a new trial.

**APPEAL** from the District Court of Rains. Tried below before the Hon. G. J. Clark.

The offense attempted to be charged by the indictment in this case was the robbery, by the appellant, in Rains county, on the twenty-sixth day of October, 1883, of Henry Ivy, by assault and violence, and putting in fear of life and bodily injury. The conviction of the appellant was supplemented by a term of two years in the penitentiary, as punishment.

Henry Ivy was the first witness for the State. He testified that he lived seven miles from the town of Emory, in Rains county, Texas. Witness was acquainted with the defendant, whom he pointed out in court, and had known him ever since he was a small boy. On the twenty-fifth or twenty-sixth day of August, 1883, witness was going home from the town of Emory, and met defendant in a lane, about three hundred yards from his, the witness's, house. Defendant asked of witness if he had been to town to report him. Witness replied that he had not; that he would make reports on nobody. Defendant replied: "If I thought you had, I would leave you lying right here." He then put his pistol to the witness's side, and asked witness how much money he had. Witness replied that he had between ten and fifteen dollars. With his pistol still presented, he told witness to hand it out, which, in fear that defendant would kill him if he refused, the witness did. The money was all in silver. Defendant took it, saying that he was going to leave the country, and that if witness reported on him for this robbery, he would return and kill the witness. This all occurred in Rains county, Texas, on either the twenty-fifth or twenty-sixth day of October, 1883. The witness did not know which. He was in Emory on both of those days, and it was on his return on either one or the other that he was assaulted and robbed by defendant as stated. It was either Thursday or Friday. It was about an hour or an hour and a half after dark. The moon was about an hour high, and was shining brightly. Witness knew that he saw the moon, but could not say for certain that no rain had fallen. Witness did not tell Grogan Williams, in the presence of Logan Williams or any one else, a few days after he, witness,

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made this complaint, near Cain's store, in the town of Emory, that defendant had robbed him on the Thursday before, about sundown, or a little after. Witness had no recollection that Mr. Grogan Williams ever asked him about when the robbery was perpetrated. He had no recollection of telling Grogan Williams that the robbery occurred on the day of a certain sale of property of Mr. Forbis, of which witness told Grogan Williams. The defendant lived at the house of Mr. Logan Williams, about three miles distant from the house of witness. Witness did not tell Jim Coats, at Coats's house, on Sunday, October 28, 1883, that the robbery occurred about sundown, or a little after. Witness had no recollection of having had a conversation with Jim Coats about this matter, at any time or place. The State rested.

Logan Williams was the first witness for the defense. He testified that the defendant was living with him on the twenty-fifth and twenty-sixth days of October, 1883. Witness's place was about three miles distant from that of the State's witness Ivy. The witness could not, of his own knowledge, say where the defendant was on Thursday, the twenty-fifth day of October, 1883. On the evening of the twenty-sixth, which was Friday, witness had the defendant helping him to dig potatoes. That was a drizzly evening. Defendant quit that work about two hours by sun, and witness saw no more of him that night. On the next morning, which was Saturday, the defendant took a load of potatoes to Emory for the witness. He was arrested that day while in town. Witness was present at the time, and heard a conversation between Grogan Williams and Ivy, the prosecuting witness. Ivy told Grogan Williams, in the presence of the witness, near the store of T. M. Cain, only a few days after the arrest of the defendant, that the defendant robbed him just after sundown. Grogan Williams told Ivy that he asked that information on behalf of the defendant, who wanted to know the time of which he was charged with the commission of the offense. Frank Trimble and two colored men, besides the witness, were present at the time this conversation between Ivy and Grogan Williams transpired.

Grogan Williams was the next witness introduced by the defense. He testified that, a few days after the arrest of the defendant, he met the State's witness Ivy near Cain's store, in the town of Emory, and asked him to tell him when it was that the defendant robbed him. The witness Ivy, in the presence of Lo-

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gan Williams, Frank Trimble and two colored men, at that time and place, told the witness that the defendant robbed him on the previous Thursday evening, just after sundown. Witness then asked him if it was on the day that witness met him on his way to town, when, in reply to witness's inquiry as to where he was going, he replied, "to Forbis's sale." Ivy replied that he believed that it was. That day the witness stated was Thursday, October 25, 1883. Witness then told Ivy that he had asked the question at the instance of the defendant, who was then in jail. Ivy did not then appear at all excited or frightened.

Frank Trimble was the next witness for the defense. He testified that he had known the defendant all his life. Defendant was a negro who belonged to the witness's father until he was freed at the close of the war. This witness corroborated the testimony of Grogan Williams as to what passed between him, Williams and Ivy, during the conversation in Emory, near Cain's store.

Jim Coats was the next witness for the defense. He testified that he saw the prosecuting witness Ivy on the Sunday following the night of his alleged robbery. He, Ivy, was at the house of the witness, and told the witness then and there that the defendant robbed him before dark, just about sundown, or a little after. Witness saw the defendant on Thursday, October 25, 1883. He, the defendant, was at a cotton picking, on the farm of the witness, occupied by a tenant named Jim Middleton. The defendant was there all day, and did not leave Middleton's until after dark. Witness knew this, because he talked with defendant at Middleton's, and saw the defendant leave there, after dark, with one Jess Martin, saying he was going to prayer meeting. Middleton lived a mile and a half distant from Ivy.

Jess Martin testified, for the defense, that he and the defendant were at Middleton's cotton picking on Thursday, October 25, 1883. They left Middleton's house about dark, or a little after, and went to a prayer meeting at Ashford Kirby's. The defendant and the witness walked side by side all the way, and at no time or place *en route* did they meet or see Henry Ivy. They went straight into Kirby's house when they reached it, and when the witness left there, he left the defendant in Kirby's house. In going to Kirby's the witness and defendant passed through Ivy's lane. Kirby's house stood five or six hundred yards beyond Ivy's.

John Murray testified, for the defense, that just before dark,



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on the evening of Thursday, October 25, 1883, he rode up to the house of Jim Middleton, on his way to a prayer meeting at Ashford Kirby's. He saw the defendant at Middleton's, and asked him if he was going to the prayer meeting. He replied that he was, and shortly afterward witness saw him and Jess Martin start off in the direction of Kirby's. They were walking and witness riding. When witness reached Kirby's, defendant was there, in the house, and he was in the house when the prayer meeting broke up, after nine o'clock. Witness left him there.

Ashford Kirby testified, for the defense, that the defendant, in company with one Jess Martin, came to a prayer meeting at witness's house. After the prayer meeting closed, the defendant and the witness sat up and talked for two hours, or more. Defendant spent that entire night with witness. The two did not go to bed until after eleven o'clock. Defendant left the witness's house, next day, Friday, about eight or nine o'clock. Henry Ivy, the prosecuting witness, came to witness's house on that Friday morning before the defendant left. He and the defendant met, talked and laughed in a perfectly friendly manner. Ivy said nothing then about being robbed on the evening before. Ivy came to the witness's house on the Sunday following, and told the witness that the defendant robbed him on the preceding Thursday evening, a little after sundown, and tried to induce the witness to testify that he knew all about it. Witness replied that he could only truthfully say that he knew nothing about it.

W. F. Montgomery, R. W. Rabe and James Garrett were introduced by the State. Each testified that they were acquainted with the reputation of the witness Ivy for truth and veracity, and that it was good.

The original motion for new trial was based upon the insufficiency of the evidence to support the judgment. A supplemental motion set up that, after the witness Ivy testified that the robbery occurred about an hour and a half after dark, when the moon was more than an hour high, the defendant's counsel made diligent search for an almanac throughout the town, and continued, without success, to search for one until a verdict was reached; that, after a verdict was reached, an almanac was found, which showed that the moon did not rise on the night of the robbery until twenty-eight minutes after one o'clock in the morning; that the jurors had informed him that, had this evi-

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dence been produced, they would have rendered a verdict of acquittal.

*H. W. Martin*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WILLSON, JUDGE. 1. An indictment for the offense of robbery which pursues, substantially, the common law precedents for that offense is sufficient. (*Burns v. The State*, 12 Texas Ct. App., 269.) But the indictment in this case does not follow such precedents. It charges as follows: "That Bill Trimble, late of the county of Rains and State of Texas, did, with force and arms, in the county of Rains and State of Texas, on the twenty-sixth day of October, A. D. 1883, by assault and by violence, and putting in fear of life and bodily injury, unlawfully and fraudulently take from the person and possession of Henry Ivy ten dollars in money," etc. This charge is in the precise words of the statute defining robbery; but it is not always sufficient to charge an offense in the words of the statute defining it. An indictment must allege the facts which constitute the crime, by averments direct, positive and certain, and not by way of argument and inference. (*Moore v. The State*, 7 Texas Ct. App., 608.)

In this indictment it is not averred that Ivy, the party alleged to have been robbed, was assaulted by the defendant, or was put in fear of life or bodily injury. It is not averred who it was that was assaulted or put in fear by the defendant. It might be argued or inferred from the statement contained in the indictment that Ivy was the person so assaulted and put in fear, but we must not resort to argument or inference to ascertain the meaning of allegations in an indictment. It might have been a fact that some other person than Ivy was assaulted and put in fear by the defendant, and that by means of such assault or putting in fear Ivy was robbed. If such were the case, the indictment should so allege, and name the party so assaulted and put in fear. It is as reasonable to conclude from the allegations in the indictment that Ivy was robbed by means of an assault upon another person, or by means of putting another person in fear, as that the robbery was effected by an assault upon him, or by putting him in fear. We have found no precedent, and we think none can be found, which would sustain this in-

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dictment. In all the precedents for this offense which we have examined, the averments as to the assault, and putting in fear, are directly and positively made, naming the person assaulted or put in fear. (1 Whart. Prac., 410; 2 Arch. Crim. Prac. and Pl., 521; 2 Bish. Crim. Pro., sec. 1002; *Reardon v. The State*, 4 Texas Ct. App., 608; *Burns v. The State*, 12 Texas Ct. App., 269.) We are of the opinion that the court erred in not sustaining the defendant's motion in arrest of judgment, based upon the insufficiency of the indictment.

2. On cross-examination of the witness Ivy, defendant's counsel asked him if he had not, just before instituting this prosecution, had a conversation with defendant about defendant's knowledge of an alleged incestuous intercourse between witness and his niece. On objection made by the State the witness was not permitted to answer the question. In the bill of exceptions taken to this ruling it is stated that this question was asked "for the purpose of showing the *animus* of the witness, and the motive the said witness could have in prosecuting the defendant." We think that for this purpose the question was proper, and that the witness should have been permitted and required to answer it. (Whart. Crim. Ev., secs. 476, 477.)

3. We are of the opinion that the court erred in overruling defendant's motion for a new trial. To our minds the testimony of the only State's witness, Ivy, as presented to us in the record, is of a very unreliable and unsatisfactory character, when considered in connection with the other evidence in the case. It by no means establishes in our minds the guilt of the defendant beyond a reasonable doubt. We think furthermore that the newly discovered evidence shown by the motion for a new trial was material, and would be likely to change the result on another trial. In our opinion the motion should have been granted upon this ground, if upon no other.

The judgment is reversed, and because the indictment is fatally defective the prosecution is dismissed.

*Reversed and dismissed.*

Opinion delivered May 3, 1884.

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Syllabus.

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[No. 3068.]

## MOISES MARTINEZ v. THE STATE. T

1. **THEFT—STANDARD OF VALUE—CHARGE OF THE COURT.**—Theft of ordinary property is a felony or misdemeanor according to whether the article stolen was worth as much as or more than twenty dollars, or less than that sum, and when that value is an issue to be determined in the trial, so as to ascertain the grade of the offense, it is the duty of the court to charge the jury upon the standard of value; which is the market value of the article if it have such a value, and if not, the amount it would cost to replace it. The requested charge in this case, though not properly embodying the law, was sufficient to call the attention of the trial court to the omission, and the failure to charge upon the standard of value was error.
2. **SAME—EVIDENCE—PROOF OF VALUE.**—Any evidence from which the jury can infer the value of a stolen chattel is evidence; as, for instance, what the owner testifies of its value to him, the opinions of witnesses acquainted with the value of like property, what such property has brought at actual sales, etc. See the statement of the case for evidence objected to by the defendant, and *held* admissible under this rule.
3. **SAME—CASE STATED.**—In a prosecution for the theft of a saddle, but one witness located the saddle in the possession of the defendant, and that witness was the party in whose possession it was found. Having testified that he purchased the saddle from the defendant, the defendant, for the purpose of laying a predicate to impeach the witness by showing his complicity in the theft, asked the witness on cross-examination the following question: "Did your wife, in your presence, at your house, and in the presence of Juan Montez and F. Gallan, on the tenth day of December, 1898, deny that the saddle was in your house, and deny all knowledge of said saddle?" *Held*, that for the purpose it was asked, the question was competent, and the exclusion of the answer thereto was error. See the opinion *in extenso* on the question.
4. **SAME—FINDING OF LOST PROPERTY—INTENT—CHARGE OF THE COURT.**—Property that is lost, equally with other property, may be the subject of theft. To constitute theft of lost property, however, the fraudulent intent, which is the gist of the offense, must exist in the mind of the taker at the time of the taking; and in case of lost property, the time of the taking is the time of the finding of the property. If the fraudulent intent did not exist at the time of the taking, no subsequent fraudulent intent in relation to the property will constitute theft. Note, in the opinion, a summary of evidence which demanded of the trial court a charge embodying the principle announced. Note also a charge formulated by this court as responsive to this issue.

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Statement of the case.

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APPEAL from the District Court of Bexar. Tried below before the Hon. G. H. Noonan.

The indictment charged the appellant with theft of a saddle, bridle and saddle blanket, of the aggregate value of thirty dollars, the property of Juan Montez, in Bexar county, Texas, on the eighth day of December, 1883. A verdict of guilty was returned against the appellant, and his punishment was assessed at a term of two years in the penitentiary.

Juan Montez was the first witness introduced by the State. He testified that, on the eighth day of December, 1883, his son, Jose Montez, left his, witness's, house near the mission, nine miles below San Antonio, to go to the city. When Jose reached the suburbs of the city, he was thrown from the horse, and the horse, with saddle, bridle and saddle blanket, made its escape from Jose. As soon as the witness was apprised of this fact, he started out to hunt for the horse, saddle, bridle and blanket. When he reached the Goliad road he saw two gentlemen traveling that road, going in the direction of San Antonio. From them he learned that they had met a man riding a paint horse, and leading a horse answering the description of witness's horse. The man, they said, was going eastward from San Antonio. Witness continued his search, and after a time found his horse on the range, but the bridle, saddle and blanket were gone. Witness subsequently learned that there was a paint horse on the ranch of Alejos Perez, which answered the description of the horse given him by the two gentlemen he met on the Goliad road. Witness went to the ranch of Mr. Perez, and there learned that the defendant had taken up a horse with a new saddle and bridle on, and had taken them to San Antonio. Witness had the parties at the ranch to describe the horse and saddle, and became satisfied that the saddle was the one he was searching for. At Perez's ranch witness talked to Trinidad Cortinez, and from him learned of the defendant's having had the horse, saddle and bridle. Witness received this information from Cortinez on the evening of December 10, 1883. Next day witness went to San Antonio, distant from Perez's ranch fifteen miles, and began a search for the saddle in the city.

Preliminary to his search he secured the professional services of police officer Pancho Galan. They finally learned that a party had taken a saddle to pawn to the pawn shop of Don Carlos Guerguin, on the night of December 9, 1883. The saddle so

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pawned to Guerguin was a full rigged new saddle, and answered the description of the one the witness had taken from him. On the night of December 9, 1883, the witness and Galan went to the house of Crecencio Bueno, across the San Pedro creek, and there found the saddle. This saddle was the property of the witness, and was taken without his knowledge or consent. Witness did not know the actual value of the saddle. It was quite new, having been used but two or three times in riding from witness's ranch to San Antonio and back, a distance of nine miles. The saddle tree was a present to the witness, and was worth at least four or five dollars. The witness had paid twenty dollars to have it rigged. The saddle exhibited on this trial was the one lost by witness and recovered from Crecencio Bueno. This all occurred in Bexar county, Texas.

Cross-examined, the witness stated that the saddle was his property, but was lost by his son Jose. It was worth twenty-five dollars. Witness did not know who got it. He did not know the defendant. He learned, in following up the saddle, that a man named Garcia took the saddle to Guerguin's pawn shop, to pawn it. Pancho Galan was with the witness when the saddle was recovered at the house of Crecencio Bueno. The witness did not know from whom Crecencio Bueno got the saddle, except from his statement. Witness did not know, except from hearsay, that the defendant ever had the saddle in his possession at all. So far as the witness knew, the defendant may have sold the saddle for Quireno Garcia. Witness would not swear that the defendant stole his saddle; he did not know whether he did or not.

J. S. Ramsey testified, for the State, that he was the proprietor of a saddle and harness establishment on Main plaza, in the city of San Antonio. He had been engaged in that business for the past fifteen years, and was a judge of the quality and value of saddles. He had examined the saddle involved in this proceeding. That saddle has been used a little, but not enough to greatly depreciate its value. In the opinion of the witness, that saddle is worth at least twenty-five dollars.

Cross-examined, the witness testified that he did not deal in second hand saddles, and would not keep them in stock. This saddle showed to have been used somewhat, and witness would not buy it. It is a second hand saddle, but well worth twenty dollars, though the witness would not give that price for it to put in stock. If, however, he wanted to buy a saddle for his in-

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dividual use, witness would pay twenty dollars for it, and esteem the price cheap.

On re-direct examination, witness said that the saddle in the hands of the original purchaser, after being ridden back and forth over a distance of nine or ten miles as often as three or four times, would, in the condition of this saddle, be worth to the original owner as much as twenty-five dollars. It would deteriorate intrinsically by such use, but little, if at all.

Francisco Galan (spoken of as Pancho Galan by the prosecuting witness,) was next called to the stand by the State. He testified that he was, and for fifteen years past had been, on the police force of the city of San Antonio. He knew Juan Montez. On or about December 11, 1883, Montez applied to him for assistance in searching for a saddle, bridle and blanket he had lost. Witness went with Montez, and on that night they found and recovered the saddle from the house of Crecencio Bueno, west of the San Pedro creek. The saddle exhibited on this trial was the saddle found by Montez and witness at Bueno's house, and claimed by Montez as his.

Cross-examined, witness stated that he at no time saw the defendant in possession of that saddle. The witness did not know the value of the saddle, but would think it worth from twelve to fourteen dollars. It was probably worth a little more before it was used.

Re-direct, the witness stated that he was a policeman, and not a dealer in saddles, and was not posted as to the value of saddles. He named the value stated merely as a matter of individual opinion, and not from a knowledge of values. In his opinion the saddle was worth, when new, fifteen or sixteen dollars, and was now worth twelve or fourteen.

Crecencio Bueno was the next witness for the State. He testified that he recognized the saddle exhibited on this trial as the one he purchased from the defendant, and which was afterwards reclaimed from him by Montez and Galan. Defendant brought that saddle to the witness's house, and sold it to him on the night of December 10, 1883.

On cross-examination, the witness stated that he paid the defendant ten dollars for the saddle, which was all that he thought he could afford to pay for it. Defendant did not tell where he got the saddle, nor did the witness know.

Trinidad Cortinez was the last witness introduced by the State. He testified that in December, 1883, he lived on the

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ranch of Alejos Perez. He saw Juan Montez at that ranch during that month. Montez was looking for a horse that had escaped from his son, with saddle, bridle and blanket. Montez described the horse and saddle, and witness told him that the defendant had brought such a horse and saddle to the ranch, and had taken them to San Antonio, as he said, to hunt an owner for them. Witness could not recall the day of the month on which this happened, but it was sometime near the first. Witness did not know that he could identify the saddle, as he looked at it from some little distance. He knew, however, that it was a new-looking full rigged saddle. Montez, on getting this information from witness, started off toward San Antonio to look for the saddle. This was two or three days after defendant started to San Antonio with the horse and saddle. Perez's ranch is on the Goliad road, some twelve or fifteen miles from San Antonio.

On cross-examination, the witness declined to swear positively that the saddle shown him was the same that was brought to Perez's ranch by the defendant. He could say, however, that it looked very much like it. When defendant left Perez's ranch he said that he was going to hunt the owner of the horse and saddle and deliver up the property. Witness did not know what he eventually did with the horse and saddle.

William Roach testified, for the defense, that he was a saddler and a judge of the value of saddles. The saddle shown the witness was worth, new in the shop, twenty-five or twenty-six dollars. In its present condition, the saddle, having been used to some extent, was not worth so much by six or eight dollars. It could not now be sold, as a second hand saddle, for more than eighteen or twenty dollars.

Cross-examined, the witness testified that the saddle, because of such use as it has had, is not intrinsically depreciated in value to the original owner. To him, it would be worth quite as much as when he got it new. Articles, when once used by one person, are less desirable for sale or market, and, because of such use, they lose much more in market than in intrinsic value. Intrinsically, this saddle is worth quite as much as it ever was. It is not worth so much in the market.

Carlos Guerguin was the defendant's next witness. He testified that he had seen the saddle in evidence before. A man who gave his name as Quireno Garcia brought it to witness's pawn shop one night, and wanted to pawn it. Garcia said that he



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brought the saddle from Kansas. Garcia was not the defendant. Witness would willingly pay sixteen dollars for the saddle, but no more.

Witness stated, on his cross-examination, that, were he to buy the saddle, he would buy it on speculation. Witness, in mentioning the price he would pay for the saddle, mentioned the speculation price. The saddle, in the opinion of the witness, was really worth more than sixteen dollars. It was worth twenty or twenty-five dollars. In buying articles, the witness, in his business, would pay but two-thirds of the actual value, and this was the rule applied by the witness in estimating the value of the saddle in his examination in chief. It was on the night of the ninth or tenth of December, 1883, that Quireno Garcia brought the saddle to the witness to pawn. Witness examined the saddle closely, for one reason, because it was a much better article than was usually brought by the class of men to whom Garcia apparently belonged; and, for another reason, because it bore the stamp of a San Antonio manufacturer, whereas Garcia said that it was made in Kansas.

The ruling embodied in the second head note of this report refers to the testimony of J. S. Ramsey, the second witness for the State.

The motion for new trial raised the questions discussed in the opinion, and criticised the charge as given by the court.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

WILLSON, JUDGE. 1. There was some conflict in the testimony as to the value of the saddle alleged to have been stolen, and there was, also, a question raised on the trial as to the proper standard of value. Evidence was admitted, over objection made by defendant, of the value of the saddle to the owner of it. In the charge of the court, the jury were not instructed as to any standard by which to determine the question of value. Upon this subject, the defendant requested the following special instruction, viz.: "The value of property is not to be based on what the owner may value it, but is to be fixed by its intrinsic value." This was refused.

It was important in this case for the jury to ascertain, correctly, the value of the saddle, because upon that value de-

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pended the grade of the offense and its punishment. If worth twenty dollars, or more, the offense was a felony; if less than that sum, it was only a misdemeanor. There was testimony both ways upon this question, some of the witnesses testifying that the saddle was worth more, and some that it was worth less than twenty dollars. Under these circumstances, we think the court should have instructed the jury as to the proper standard by which to arrive at the value of the property.

What is this proper standard in cases of theft? Mr. Bishop says: "The word 'value' is, like most others, even in legal language, slightly variable in meaning; but, ordinarily, for the purposes of this inquiry, it signifies the sum for which the like goods are, at the time, commonly bought and sold in the market. If a thing has a value to the owner, though to no one else, to steal it is larceny, its 'value, as to the rest of the world,' being, in the language of Grose, Judge, 'immaterial.' Still, in determining the grade of the offense, the value merely to the owner is not the standard for the jury. Yet, a thing not bought and sold in the market may have a value, as when it is an article fitted for a specific use of the owners, and worthless for every other purpose. To attempt to test it by the open market, where it is never offered for sale, and is never bought, would be absurd. In reason, the cost of replacing it would ordinarily be the standard of its value." (2 Bish. Crim. Prac., sec. 751.)

Adopting the foregoing as the correct rule, the proper standard of value in this case was the market value of the saddle, if there was any market for such property. If it had no market value, then the amount that it would cost to replace it would be the standard of its worth. While the special instruction requested by defendant upon this subject did not correctly prescribe the standard of value, it was sufficient to call the attention of the court to that issue in the case, and to the fact that the law upon such issue had been omitted in the court's charge. It was error, in our opinion, to fail to instruct the jury as to the proper standard of value.

2. As to the mode of proving value in trials for theft, Mr. Bishop says: "Any evidence from which the jury can infer the value of a stolen chattle is competent; as what the owner testifies of its value to him, the opinions of witnesses acquainted with the value of like property, what such property has brought at actual sales, etc." (2 Bish. Crim. Prac., sec. 751.) We are of the opinion that, under the rule above quoted, the testimony

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objected to by defendant to prove the value of the saddle was admissible.

3. The saddle stolen was found in the possession of one Crencio Bueno, who testified that he bought it from the defendant. No other witness proved that defendant ever had possession of that identical saddle. On cross-examination of this witness, the defendant's counsel asked him the following question: "Did your wife, in your presence, and at your house, and in the presence of Juan Montez and F. Galan, on the tenth day of December, 1883, deny that the saddle was in your house, and deny all knowledge of said saddle?" This question was propounded for the purpose of laying a predicate to impeach this witness, by showing his complicity in the theft of the saddle. It was objected to by the district attorney, and the court sustained the objection. In the bill of exceptions to this ruling, the learned judge gives his reasons for the ruling, as follows: "Because the question asked seeks to elicit the statements, if any were made, of a third party, who is the wife of the witness; because it seeks to elicit a statement of a third party at the time the saddle was discovered, when the State sought to elicit everything that was said at that time and place, in its examination of this witness and F. Galan in chief, and which was excluded by the court, on objection of counsel for defendant; because the question relates to what a third party said, if anything, in which the defendant nor the witness had any participation; and because said testimony is inadmissible and irrelevant, and does not inform the jury of anything material in connection with the cause."

We differ with the learned judge upon this question; and do not think that the reasons assigned for his ruling are sound. For the purpose for which the question was asked, we think it was legitimate. If the witness was present, and heard the persons who were in search of the saddle inquire for it and describe it, and heard his wife assert to them that it was not there, and that she had no knowledge of it, and he remained silent, knowing at the same time that the saddle was in his house, and in his possession, it seems to us that these facts would bear strongly against the credibility of this witness, and might reasonably be calculated to influence the minds of the jury in weighing his testimony. To say the least of it, it would be a circumstance tending to cast a suspicion upon the witness that he was an accomplice in the theft of the saddle. The question was not ob-

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jectionable because it sought to elicit statements made by the wife of the witness. It was not a violation of the rule that the husband or the wife shall not be allowed to testify against each other, for the witness was not upon trial for any offense. Nor can we perceive why the question should be held improper because the State had sought to prove all that was said on the occasion of the discovery of the saddle, but had not been permitted to do so, upon objections interposed by the defendant. The State was not entitled to prove what was said on that occasion, the defendant not being present, and such testimony was properly rejected. But, because the defendant did not choose to allow, without objection, illegal testimony to be introduced against him, is he to be denied the right of introducing that which is legal, and which he conceives to be to his advantage? Clearly not, we think.

4. There is another question in this case of more importance than those we have discussed. Conceding that the defendant took the saddle, did such taking, under the facts of this case, constitute theft? and did the court charge all the law applicable to the issues raised by the evidence? That the owner of the saddle had lost it was proved beyond a question. It was, then, lost property, but was, nevertheless, the subject of theft. To constitute theft, however, the fraudulent intent, which is the gist of this offense, must exist in the mind of the taker at the very time of the taking; and, in the case of lost property, the time of the *taking* is the time of the *finding* of the property. If the fraudulent intent did not exist at the time of the taking, no subsequent fraudulent intent in relation to the property will constitute theft. (*Robinson v. The State*, 11 Texas Ct. App., 403.)

In this case it was proved that on the day the saddle was lost, the defendant was seen in possession of such a saddle, and said that he was going to the city of San Antonio to search for the owner of it in order to deliver it to the owner. He did not then pretend that the saddle belonged to him, but admitted that he had found it, and intended to search for the owner of it. There is no evidence which shows that, even if the defendant took the saddle, he at the time intended to deprive the owner of the value of it, and to appropriate it to his own use or benefit. On the contrary, his own statements above alluded to, which were proved by the State, show that *after* he had taken the property, his intention with regard to it was an honest one; he intended

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to restore it to the owner, if such owner could be found. Upon this state of facts we think it was the duty of the trial court to instruct the jury clearly and specifically upon the issues as to the intent of the defendant at the time he took the property, if he did take it.

The charge of the court did not explain this issue to the jury any farther than to give the general definition of theft. Defendant requested the following special instruction, which the court refused to give, viz: "If the property came into the possession of the defendant by lawful means, the subsequent appropriation of it is not theft, and you will acquit the defendant, unless it was obtained by false pretext, or with intent to deprive the owner of the value thereof and appropriate the property to the use and benefit of the person taking." This charge would have been more directly applicable to the evidence if it had read: "If you believe from the evidence that the property was lost, and that the defendant found it, he cannot be convicted of the theft of it unless you believe from the evidence that at the time he found it he fraudulently took it with the intent at that time to deprive the owner of the value of it, and to appropriate it to his own use or benefit. No fraudulent intent in the mind of the defendant in relation to the property, which was formed after he had taken the property, will authorize his conviction of the theft of such property."

We think a charge in substance such as we have suggested was demanded by the evidence in this case, and that the court erred in omitting to give such an one. The charge of the court was excepted to by the defendant, because it failed to give the jury all the law of the case, and for other reasons. We think the court erred in not instructing the jury upon the question of intent as above indicated.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 3, 1884.

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Opinion of the court.

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[No. 2907.]

## MARK ANDERSON v. THE STATE.

**AGGRAVATED ASSAULT—CHARGE OF THE COURT.**—**INFORMATION** charged that the assault was aggravated because made with a deadly weapon, to wit, an axe. The court charged, as requested by the State, that "the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with an intent to alarm another, and under circumstances calculated to effect that object, comes within the meaning of an assault. When a dangerous weapon is used under the above mentioned circumstances, the ability to effect injury is not necessary." *Held*, error, as not applicable to the assault charged, and as an abandonment of the aggravation alleged in the information.

**APPEAL** from the County Court of Caldwell. Tried below before the Hon. Lee Rogan, County Judge.

The information charged the appellant with an aggravated assault upon G. W. Lockard, in Caldwell county, Texas, on the eighteenth day of July, 1883. The ground of aggravation was alleged to be the use of a deadly weapon, to wit, an ax. The appellant's trial resulted in his conviction, and his punishment was assessed at a fine of thirty-five dollars.

The motion for new trial set up the ground considered in the opinion.

*Stringfellow & McNeal*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**HURT, JUDGE.** Appellant was convicted of an aggravated assault, upon an information charging that the assault was aggravated because made with a *deadly* weapon, to wit, an ax. No other ground of aggravation is even hinted at in the information.

At the request of the State, the learned judge presiding gave this charge to the jury: "The use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with an intent to alarm another, and under circumstances calculated to effect that object, comes within the meaning of an

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Statement of the case.

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assault. When a dangerous weapon is used under the above mentioned circumstances, the ability to effect injury is not necessary."

This charge has no application whatever to the *aggravated assault alleged in the information*. It is an abandonment of the information altogether, so far as the ground of aggravation is concerned, and this conviction, if the jury were influenced by the charge, was without allegation to support it. The charge being radically wrong, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 3, 1884

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[No. 2912.]

G. J. MAKINSON v. THE STATE.

1. CONTINUANCE—CHANGE OF VENUE—BILLS OF EXCEPTION.—In the absence of proper bills of exception, this court will not revise the action of the court below in refusing a continuance, and in overruling a motion to change the venue.
2. ROBBERY—CIRCUMSTANTIAL EVIDENCE—CHARGE OF THE COURT.—It is only in cases when the State relies solely upon circumstantial evidence to secure a conviction that the trial court is required to charge the principles of law governing circumstantial evidence.
3. SAME—PRACTICE—NEW TRIAL.—When it appears that the alleged newly discovered evidence upon which a motion for new trial is predicated is not, in fact, newly discovered evidence, but was, or, by proper diligence, might have been, known to the defendant at the time of his trial, the new trial is properly refused, so far as that ground was concerned.
4. SAME—EVIDENCE—FACT CASE.—See evidence held sufficient to support a conviction for robbery.

APPEAL from the District Court of Travis. Tried below before the Hon. A. S. Walker.

The indictment charged the appellant with the robbery of the Reverend R. K. Smoot, in Travis county, Texas, on the twenty-fifth day of July, 1883. The means alleged was an assault with a pistol, whereby the said R. K. Smoot was put in fear of bodily

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Statement of the case.

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harm. The appellant's trial resulted in his conviction, and his punishment was assessed at a term of five years in the penitentiary.

The first witness introduced by the State was the Reverend R. K. Smoot. He testified that he was a minister of the Presbyterian church, and had lived in the city of Austin for seven years. He was robbed of five silver dollars on the night of Wednesday, July 25, 1883. The point at which the robbery occurred was on West Pecan street, five blocks west of Congress Avenue, in the city of Austin. The witness, at the time, was on his way home from the city, and was riding alone in his buggy, the buggy top being thrown back. Detailing the particulars of the robbery, the witness said: "I was driving along slowly, with a man riding along horseback with me. When the saddle of his horse got about opposite the front wheel of the buggy, the man said: 'Stop!' He was then close to me. He asked me where Plum street was. I was about telling him, when he dropped a pistol on me and said: 'Your money or your life.' Witness replied: 'If left to me, I'll give my money, as I have but little;' and I told him I had five dollars, given me by a deacon that night. He then asked me of what denomination I was. I told him. He then said: 'You have a watch?' I replied 'Yes, but it will do you no good, as it is a present, and my name is engraved on it.' I gave it to him. He took it, examined it, and called for the money. I gave it, and he took it and said: 'You open your mouth, and I'll kill you.' Having the money, he galloped off, and I saw him no more. I gave him the money from fear. I think he would have shot if I had not given it. I think that I am satisfied in my own mind that that young man (pointing to the defendant) did it."

On cross-examination, the witness said that all of this occurred on a bright starlight night. The witness did not know, but had reason to believe that he once before saw the defendant at a point beyond the residence of Governor Pease, near the city of Austin. Of this, however, the witness was not absolutely certain. Referring to the occasion on which he believed that he saw the defendant previous to the night of the robbery, the witness said that he was driving along back of Governor Pease's place, hunting for the residence of Mr. Stelfox, junior. A wire fence on one side and a rail fence on the other formed a lane, at the end of which a water cart stood. Three men were sitting at the cart. Witness inquired of them the way to Mr. Stelfox's. One



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of the men directed the witness and asked his business. Witness replied that he was a minister, and was visiting as such. The man then asked the time of day, and witness drew out his watch and told him. He then asked what denomination the witness belonged to, and witness told. Further conversation with this man was excluded, and the witness said that without repeating that conversation, he could not give his reason for believing he had seen the defendant before the night of the robbery.

At the time of the robbery, the witness remarked to the defendant: "Young man, you will be caught, and I will be called upon to identify you, and I have your voice well fixed in my mind." In talking with him afterward, the witness recognized his voice. Witness knew the defendant as the man he talked with and identified in the jail. The witness was familiar with the voice of every man he had ever talked with, when he took occasion to give it close attention. He, witness, would swear that he recognized the defendant by his voice, but not from his personal appearance; and he believed that, by the voice, he could recognize any one with whom he had ever held a conversation. The town clock struck nine just as the witness stepped out of church that night.

On re-examination, the witness stated that he was morally certain that the defendant was the man who robbed him on that night. On the day after the witness heard of the arrest of the defendant, he went to the jail to see the defendant. He told sheriff Hornsby not to point the defendant out to him. Witness saw several prisoners, and spoke to one or two before he spoke to the defendant. The defendant hesitated before he would talk to the witness, but when he did speak, the witness identified him. He was the third man to whom the witness spoke in the jail. Witness was thoroughly satisfied that defendant was the man who robbed him in the manner stated. Sheriff Hornsby was the only person present at the witness's interview with the defendant in the jail.

At the time of the robbery, the defendant was riding a bay horse about fifteen or fifteen and a half hands high. Witness took this animal to be a mare. She was hardly so large as the mare driven by the witness. When defendant took the money from witness's hand, he clucked to his animal and galloped off east, leaving witness standing. Witness afterwards drove off

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Statement of the case.

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west. The point at which the robbery occurred was between Rio Grande and Nueces streets.

Doctor R. M. Swearingen was the next witness for the State. He was of opinion that he first saw the defendant on the night of July 25, 1883, about nine o'clock, at the intersection of West Pecan and Rio Grande streets, in the city of Austin, Texas. Witness was then returning to town from a visit to a patient. When he first saw the defendant, the latter was standing still. Witness was driving slowly at the time, his horse being much fatigued. The defendant "sidled" up to the witness, and asked him directions to Peach street. An interview ensued. Witness stopped to think if he knew the location of Peach street, and defendant approached within three feet of him, and asked if the street on which they were was not West Pecan street. Witness answered in the affirmative. Witness's interview with defendant did not last over three or four minutes. Witness surveyed him as closely and as carefully as he could in the starlight. The form and shape of the man, his hat, clothing, and everything about him were noticed by witness as accurately as was possible under the circumstances. Witness looked at him carefully, with the view of remembering him in the future. This careful inspection of the defendant was made by witness at a distance of not more than three feet, and while the defendant was leaning toward witness. Witness charged his mind with his contour as he rode off, and did so for the purpose of fixing defendant in his mind. There was no moon and no clouds, but the night was bright starlight. The defendant wore, on the occasion of that interview, dark colored clothes and a large, heavy, broad brimmed hat. The witness took notice, but not as carefully, of his horse. He rode a high headed, long necked bay horse, about fifteen hands in height. The horse appeared somewhat jaded. The witness saw a weapon on the defendant, a large nickel plated revolver. Some eight or ten days after that interview, the witness met the defendant on the streets of the city of Austin, in charge of three or four officers, or guards, none of whom the witness knew. Witness followed this party to the court house, into the sheriff's room, where he had a conversation with the defendant, in the presence of the sheriff and others.

The watch and chain shown witness, as having been taken from the defendant, belong to the witness. Neither the watch nor chain was in witness's possession on the first day of August,

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1883. They were recovered on that day, and were delivered to witness on the next day, August 2, 1883. A gentleman named Johnson returned the watch to the witness.

Asa Johnson was the next witness sworn for the State. He testified that he lived near Dripping Springs, in Hays county, Texas. He knew the defendant. Witness first saw the defendant on the twenty-eighth day of July, 1883, at the house of Bill Reeves, on Onion creek, in Hays county. Witness was one of the parties who arrested the defendant. Witness was at Reeves's shop on the evening of Saturday, July 29, 1883, when defendant came there. Defendant and one Burns sat on a wood pile for some time, talking. These two then went off into the peach orchard. On the following Tuesday the witness was deputised by the sheriff of Hays county to arrest the defendant anywhere he could be found. Witness was at Reeves's again on that Tuesday, on the evening of which day defendant came there again. Witness told Reeves about the defendant, and then went and got Jones and Burns to assist in making the arrest of defendant. Next morning witness and his party went into the room at Reeves's occupied by the defendant, and arrested him. The defendant was asleep, with his head covered up when witness went in to make the arrest. Burns called to the defendant to get up, and Jones uncovered his head. Defendant raised up and grabbed the barrel of a shot gun, at which he made two jerks. Defendant had just awakened, was excited, and did not know what he was doing. He released the gun when ordered to surrender, and when witness told him what he was arrested for, he demanded to see the papers upon which the arrest was made. Witness told him that he had no papers, whereupon the defendant threatened to prosecute witness if the arrest was made without papers.

The arresting party remained outside of the house during the night preceding the arrest, and did not go into the room until they made the arrest. When arrested, the defendant had a nickel plated pistol, a six shooter, under his pillow, on the floor. This occurred on the Tuesday following the Saturday the witness first saw the defendant, which was the Saturday before he was brought to Austin. On the day that the witness first saw the defendant, he was riding a bay mare about fifteen hands high. He rode the same or a similar mare on the Saturday of his last visit to Reeves's, which was the day before his arrest. After the arrest of the defendant, Reeves took defendant's pis-

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tol, and searched his clothing, in which he found two watches and forty-nine dollars and a half, seven dollars and a half of which was in specie. Witness was not positive about the amount of specie, but the amount was, as he best remembered, about as stated. The greenbacks—forty-two dollars, as witness remembers—the two watches and the pistol, were retained, and the specie money given back to the defendant. Defendant at this time was dressed in a blue suit. Witness did not recollect the style or color of the hat he wore. He wore a different suit, gray in color, as the witness remembers, on the Saturday previous to his arrest. One of the watches taken from defendant was small in size, with a long gold chain, attached to which a charm in the shape of a compass and square was suspended. The other was an open faced brass watch, to which a somewhat worn hair chain was attached. A stain or black spot was on the chain of this watch.

Of the forty-two dollars in currency taken from the defendant, one bill was of the denomination of twenty dollars, two of ten, and two of one dollar. One of the tens was somewhat torn at a corner, to which a piece of writing paper had been pasted. A bill was exhibited, and was pronounced by the witness to be the same, according to his belief. Reeves and Jones accompanied witness and defendant to Kyle, and Lon Martin came with the party to Austin from Kyle. They turned the defendant over to sheriff Hornsby. One of the watches described the witness delivered to Doctor Swearingen, and the other to a gentleman named Henkle. The money was turned over to deputy sheriff Johnson; for which the witness took a receipt. Witness identified the two watches exhibited as those recovered from defendant and delivered by him to Doctor Swearingen and Mr. Henkle. Witness here gave minute reasons by which he was enabled to identify the watches, having also described them before they were handed to him for examination. Witness did not have the silver money in his hands at all, and did not know the denomination of the several pieces. Witness did not notice whether or not defendant's horse was jaded when he rode up to Reeves's on the Saturday named.

W. T. Reeves was the next witness for the State. He testified that he resided on Onion creek, about five miles south of Dripping Springs. He first saw the defendant on the evening of Saturday, July 28, 1883. He was at that time, when the witness saw him, standing near a bay mare about fifteen hands

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high. Witness saw him next on the evening of Tuesday, July 31, 1883. He was then riding the same animal. He was dressed in a gray suit on Saturday, and on Tuesday he wore a blue suit, and, as the witness remembers, a light colored hat. Witness was one of the parties who arrested the defendant. The witness here substantially corroborated, in detail, the testimony of Asa Johnson as to the circumstances of the arrest, the recovery and disposition of the two watches, and the delivery of the defendant to the Travis county authorities.

The amount of money taken from the clothes of the defendant was forty-nine and a half dollars, of which forty-two were in currency—one twenty, two ten, and two one dollar bills—and seven and a half dollars in specie. One of the ten dollar bills was torn and pasted at one corner. This money witness turned over to officer Johnson, who delivered it to deputy sheriff Mat Johnson. The specie money was left in possession of the defendant. The defendant's horse was pretty well jaded when he came to witness's house on Tuesday evening.

H. L. Burns was the next witness introduced by the State. He testified that he lived near Dripping Springs, in Hays county. He saw the defendant on two occasions before seeing him in the court house on this trial. The first time was on a Saturday about the twenty-seventh day of July, 1883. He was then at W. T. Reeves's, on Onion creek, in Hays county, about twenty-four miles distant from Austin. He was then on foot. The witness saw him go into the orchard on that occasion. The witness next saw him at Reeves's on Wednesday morning, about August 1, 1883. Witness, Johnson and Jones arrested the defendant on that morning in the presence of Reeves. Regarding the circumstances of the arrest and the removal of the defendant to jail at Austin, the testimony of the witness did not vary from that of Johnson and Reeves. He corroborated those two witnesses as to the pistol, watches and money taken from the defendant, and identified the two watches which, he said, were subsequently delivered to Swearingen and Henkle. The silver money was returned to the defendant. Besides the blue suit of clothes, the defendant had on a gray suit, at the time of his arrest. These he wore under the blue suit. Witness did not notice the style of hat worn by defendant.

W. J. Jones testified, for the State, that he saw the defendant at Reeves's house, in Hays county, on Saturday, July 28, 1883, and again at the same place on the following Tuesday. Witness

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was one of the party that arrested him. The witness here narrated the circumstances of the arrest and confinement of defendant, the discovery of the pistol, money and watches on his person, and the subsequent disposition of the articles, substantially in accord with the narratives of the previous witnesses, and identified the watches and the mutilated ten dollar bill as fully as they were identified by the other witnesses. Reevis, he said, searched the defendant's clothing, which at the time of the arrest was lying at the head of his pallet. The suit of clothes was of navy blue cloth. He wore a pair of gray pants under his blue suit. His hat was white of color, with broad brim. Of the silver money, two or three pieces were in half dollars, the residue in dollar pieces.

James Talley was the next witness for the State. He testified that he lived in Llano county, Texas. He could not say that he did or did not know the defendant. He knew him from seeing him in the court room, before being called to testify. The witness was robbed by two men one night, but was unable to swear that he had ever seen the defendant before he saw him in the Travis county jail, and in the court house.

The witness was robbed, on the occasion referred to, about three miles distant from Austin, on the Burnet road. He was *en route* to Austin, and was camped at the time. It was about one or two o'clock in the morning. When the witness waked, two men, on horseback, were standing by him, each with a six shooter in his hand, and a third man, on horseback, was standing off some fifty yards distant. The defendant, if he was one of the men engaged in the robbery, was the one who rode a high headed bay horse, some fifteen or sixteen hands high. The two men near the witness got down from their horses, and a conversation of some five minutes duration ensued between witness and them. The man on the bay horse said nothing to the witness. The man who was with the rider of the bay animal picked up the witness's coat, pants and vest, and took from them all the money that the witness had. Their horses stood quite near the pallet on which the witness slept. If the defendant was the man who rode the bay horse, he had a pistol which the witness saw plainly, but which he could not describe. The same man pulled out a gold watch, which he said he had taken from a doctor in Austin. He stood some seven or eight feet from witness when he exposed the watch. Witness saw the watch. It was a small gold watch with a double link gold chain,

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on the end of which was a charm in shape of a compass and square, and, the witness believed, an ornamental key, pendant. Witness identified the watch and chain, and said that he now saw that the part of the chain he took to be an ornamental key was a bar. After the remark about taking the watch from an Austin doctor, the men mounted their horses and rode off. The man who rode the gray horse wore a suit of gray clothes. If defendant is that man, witness next saw him in the Travis county jail. Witness would not positively swear that defendant was one of the men who robbed him.

Cross-examined, the witness stated that he did not point the defendant out in jail. Defendant was brought to him by the sheriff. In shape and size, the defendant resembles the man who took part in that robbery, and who rode the bay horse, as stated. The robbery of the witness occurred on the night of Friday July 27, or 28, or, rather, on Saturday morning, about two o'clock. Witness could not absolutely identify the defendant as one of the robbers, but felt confident and positive, in his own mind, that defendant was the man who rode the bay horse and participated in that robbery.

L. Henkle was the next witness for the State. He testified that he was a resident of the city of Austin. He had seen the defendant prior to this trial, once in justice Tegener's court room, and once in the room of the Travis county jailor. The witness could not say that the defendant was the same man who robbed him. He does not appear quite so tall or quite so old as that man, though the voice is very much or quite the voice of the man who robbed witness. If he could see the robber dressed as he was at the time of the robbery, and riding the same horse, the witness thought he could identify him, but he could not say that he ever saw the defendant before he saw him in justice Tegener's court room. The man who robbed the witness was, at the time, riding a bay horse of about an average size. He had a pistol that glistened in the moonlight. This robbery occurred about one o'clock at night, below Pressler's garden, on the continuation of West Pecan street, between the residences of Judge Sheeks and J. R. Johnson.

The ten dollar bill here shown to the witness, and said to have been taken from the defendant, is a bill that was taken from the witness on the night of the robbery. Before this bill was returned to the witness, witness selected it from four or five other bills handed him in the jailor's room. Witness also iden-

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tified a watch taken from the clothing of the defendant as his watch, and as the same that was taken from him at the time of the robbery.

M. M. Johnson, chief deputy sheriff of Travis county, was the next witness for the State. He testified that he was the book-keeper of the sheriff. The defendant was placed in jail, as shown by the sheriff's record, on the first day of August, 1883. That record contains the defendant's name, the date of his arrest, the court by which he was committed, and the offense of which he is charged. From Asa Johnson, one of the officers who delivered the prisoner, the witness received forty-two dollars in currency, for which he gave Asa Johnson a receipt. These forty-two dollars the witness turned over to sheriff Hornsby. Witness remembered nothing about these bills, except their denomination. One was a twenty dollar bill, two were tens, and two were ones.

Defense admitted that this money was the identical money that Johnson, Reeves, Burns and Jones took from defendant in Hays county. The State closed.

C. F. Rumpel was the first witness for the defense. He testified that he was in the city of Austin from July 22 to July 26, 1883. He was in the city of Austin during the time that it was said that highway robberies were being committed upon the street, and at the time of the robbery of Doctor Smoot. A man coming toward West Pecan street pointed pistol at witness, for the purpose of robbing him, about ten o'clock in the morning, on the day after the robbery of Doctor Smoot and others. That man rode a fox or reddish bay colored horse. The defendant was not the man who attacked witness.

Sheriff M. M. Hornsby testified, for the defense, that the defendant came into his charge on the last day of August or first day of September, 1883. He had a horse, but witness knew nothing of that horse, of his own knowledge. He had a bill of sale of a horse, which witness sent to the foreman of the grand jury.

H. Younger testified, for the defense, that he was fifty-four years old. He had had some experience in identifying persons. He knew nothing about identifying people by the voice. He had never had occasion to try such experiment.

H. G. Thompson was the next witness for the defense. He testified that he lived in Uvalde county, Texas. He had known the defendant for three or four years. The defendant is sixteen



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Opinion of the court.

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years old, and perhaps a few months older. The defendant worked about six months for the witness, and witness was well acquainted with his reputation for honesty. The defendant worked for the witness on a sheep ranch, and had many and ample opportunities to steal from the witness, and never stole anything that the witness ever knew or heard of. His reputation for honesty was good in Uvalde county. His character generally was good in that county. He had two horses when he left the witness's place. His father owns a few head of cattle, but is rather a poor man.

Cross-examined, the witness stated that the defendant was his wife's brother. Witness came to Austin to testify in this case, and has been in the city, brought and kept here by attachment, for five or six weeks. When defendant left witness's house he went to Mr. Wilson's house, in Burnet county, where he remained through the lambing season, and leaving there, the witness believed, some time in April, 1883. He left witness's house in March, 1883. He left to hunt a horse that he believed had strayed to Burnet county. Witness did not see him again until he saw him in custody in Austin.

Mrs. Makinson, the mother of the defendant, testified that he was born on the twenty-seventh day of May, 1867.

The motion for new trial raised the questions discussed in the opinion, denounced the action of the court in refusing special charges asked, and the verdict as contrary to law and evidence.

*Walton & Hill*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WILSON, JUDGE. 1. There are no bills of exception in the record to any ruling or action of the trial court. We are therefore not required to consider whether or not there was error in overruling defendant's application for a continuance, or the refusal of his motion for a change of venue. (Code Crim. Proc., Art. 686; Clark's Crim. Law, p. 523, note 209.)

2. It is only in cases where circumstantial evidence *alone* is relied upon by the State to obtain a conviction, that the trial court is required to instruct the jury as to the principles of law concerning that character of evidence. (*Tooney v. The State*, 8 Texas Ct. App., 452; *Hardin v. The State*, Id., 653.) In a case where the testimony establishing the commission of the offense

## Syllabus.

by the defendant is both direct and circumstantial, such instructions are not demanded. In the case under consideration there was not only strong circumstantial evidence proving the defendant's guilt, but there was direct, positive and convincing proof that he was the identical party who committed the robbery charged in the indictment. It was not error, therefore, for the court to omit and refuse to charge the jury in relation to circumstantial evidence. We think the charge of the court was in all respects full, fair, correct and applicable to the evidence.

3. We find no error in the refusal of defendant's motion for a new trial. As to the alleged newly discovered evidence, the facts in regard thereto, as stated in the motion, show conclusively that it was not newly discovered, but must have been, or would have been by the use of reasonable diligence, within the knowledge of the defendant at and before the trial. This ground of the motion is entirely insufficient, and without merit.

We have examined the other grounds of the motion for new trial, and in our opinion none of them are supported by the record. That the verdict of the jury is fully sanctioned by the evidence there can be no question, and in all respects we believe the conviction to be legal and just.

The judgment is affirmed.

*Affirmed.*

Opinion delivered April 30, 1884.

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28	141
39	537
16	144
35	173

[No. 3096.]

J. F. BRYANT v. THE STATE.

1. **THEFT—INDICTMENT—ARREST OF JUDGMENT.**—Indictment for theft described the stolen property as "one twenty dollar gold piece of the value of twenty dollars, current money of the United States, and one five dollar bill in money of the value of five dollars, and one pocket knife of the value of fifty cents, of the corporeal personal property of J. W. McKnight." The motion in arrest of judgment alleged the insufficiency of the description of the alleged stolen property. *Held*, sufficient, under Article 782 of the Code of Criminal Procedure, which declares "money" to be "property," and under Article 427 of the same Code, which provides that, "when it becomes necessary to describe property of any kind in an indictment, a general description of the same by name, kind, quality, number and ownership, if known, shall be sufficient." The motion in arrest of judgment was properly overruled.

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2. **SAME.—POSSESSION OF RECENTLY STOLEN PROPERTY—CHARGE OF THE COURT.**—The trial court charged the jury as follows: "Possession of property recently stolen is evidence against the accused, which, like all other evidence, is to be taken and considered by the jury in connection with other testimony in the case." *Held*, that exception to the charge was well taken, inasmuch as in charging upon this evidence, separate and apart from the other evidence in the case, the court gave to it undue prominence; and particularly was it error to charge positively that such evidence was *against* the defendant.
3. **SAME.**—The true rule on the subject is that "the possession of property recently stolen is merely a fact or circumstance to be considered by the jury in connection with all the other evidence submitted to them, in determining the guilt of the possessor."
4. **SAME.**—Nor is it always that the possession of recently stolen property is evidence *against* the possessor. It is always admissible evidence in a trial for theft, but it is for the jury and not the judge to say whether it is or is not against the defendant. Moreover, when it is evidence against the defendant, it is not of itself, unaided by other evidence, sufficient to support a conviction; and the court further erred in refusing to so charge, when requested.
5. **SAME.—CIRCUMSTANTIAL EVIDENCE** being alone relied upon by the State, the court charged as follows: "In order to convict upon circumstantial evidence, the circumstances must be so connected as to exclude every reasonable hypothesis but the guilt of the defendant." Exception that the charge as given was not full and explicit enough to enable the jury to properly understand and apply the rule governing circumstantial evidence, was well taken, especially when shown that the principal State's witness was intoxicated at the time of the theft.

APPEAL from the District Court of Rains. Tried below before the Hon. G. J. Clark.

The appellant was charged by indictment with the theft of twenty-five dollars in money, and a pocket knife, the property of J. W. McKnight, in Rains county, Texas, on the seventeenth day of March, 1884. The trial resulted in a verdict of guilty, and a term of two years in the penitentiary was the punishment awarded.

J. W. McKnight was the first witness introduced by the State. He testified that he lived in Quitman, Wood county, Texas. He knew the defendant, and had known him for four or five years in Rains county. The witness was in the town of Emory, Rains county, on or about the seventeenth day of March, 1884, and stopped at the Montgomery hotel. He lost some property on Monday. It consisted of a twenty dollar gold piece, a five dollar greenback bill, three dollars in silver and a pocket knife.

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Statement of the case.

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This property, the witness thought, was lost at the hotel. The witness was all about and around town in the forenoon of that day, with a party of gentlemen, including the defendant. Witness was at the two saloons, and on several occasions drew out his money, with the remark that he was not yet broke. The witness was drinking. The defendant left Coke's saloon with the witness, went with him to the hotel, and took dinner with witness. After eating a while the witness dropped into a slumber at the table. He, however, was not asleep, for he heard Mrs. Eliza Montgomery tell the defendant to take the witness up stairs and put him to bed. Defendant did so. Witness did not remember who was at the table when he and defendant left it to go up stairs. Having got up stairs with defendant, the witness pulled off his pantaloons, threw them on a chair that stood three or four feet from the bed, dropped over on the bed and went to sleep. The money described by witness was in his pantaloons pockets when he threw them on the chair. This the witness knew, because he heard it rattle. The defendant at that moment was at the door, leaving the room.

The witness did not know how long he lay asleep in this upstairs room, but when he got up, his twenty-eight dollars, gloves and pocket knife were gone. He went up to the saloons and inquired if any of the boys had his money. Here the witness was shown a five dollar greenback, which he pronounced to be the bill taken from him. He identified the bill by its being torn and plastered across one end. He had no other means of identifying it. It was a bill which had been given him on the morning of the theft by H. W. Martin, to be used by witness in paying Martin's taxes in Wood county. When Martin gave it to him, about nine o'clock that morning, witness placed it in his pocketbook. The witness had never since seen the twenty dollar gold piece nor the one dollar silver pieces, but, on the evening after the theft, he saw the defendant whittling with the knife that was taken from him at the same time that the money was taken. Witness had never said that he believed some person other than the defendant had the money, and he had never said that he thought he left it with Jim Hicks, the barkeeper at Coke's saloon. The gold piece and greenback bill were in the same pocketbook in the witness's pocket, and the three dollars were loose in the pocket.

Oscar Dick testified, for the State, that he knew both the defendant and the prosecuting witness, McKnight. He saw them

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Statement of the case.

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together in the saloon on the day of the alleged theft. McKnight was drinking somewhat; showed his money very freely, with the remark that he was not yet broke. He went off with the defendant about twelve o'clock. The witness did not know where they went to. McKnight came back to the saloon some time after dinner, and inquired for his money, saying that he had lost it, and that he thought he had given it to Jim Hicks. Witness told him that possibly he had let Jim Forbis have it, and he left, to hunt Forbis. Witness stayed at Coke's saloon with Jim Hicks. The witness saw McKnight in Coke's saloon, before dinner on that day, with a twenty dollar gold piece and three dollars in silver. When witness saw this money, McKnight was waving it around, declaring that he was not broke. He had some money loose in his pocket. In his pocketbook, which he carried in his hip pocket, he had the twenty dollar gold piece and some greenback money.

James Hicks, barkeeper at Coke's saloon, testified, for the State, that he saw McKnight and the defendant together in Coke's saloon on the morning of the alleged theft. McKnight was drinking somewhat in that saloon. Witness did not know how much he had drunk elsewhere. McKnight was showing his money around, but witness took little notice of him, being busy, as it was pay day with tie cutters, a great many of whom were in the saloon. The defendant left the saloon with McKnight about twelve o'clock, going, the witness believed, to the Montgomery House, where McKnight took his meals, and where the defendant lived, as a solicitor for the hotel. Witness saw McKnight after dinner. He was inquiring for his money, which he said that he had lost.

James Forbis was the next witness introduced by the State. He testified that he saw the defendant in the town of Emory on the seventeenth day of March, 1884. He saw Mr. McKnight there on the same day. McKnight seemed to be drinking, and was showing money around. He had, according to the witness's recollection, a twenty dollar gold piece, a five dollar greenback bill, and three dollars in silver.

H. W. Martin testified, for the State, that on the morning of the seventeenth of March, 1884, in the town of Emory, Rains county, Texas, he gave the prosecuting witness McKnight a five dollar greenback bill, with which to pay his, witness's, taxes in Wood county. The bill identified by McKnight being shown to the witness, he said that he could not recognize it as the same,

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Opinion of the court.

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as he did not recognize the number. He remembered, however, that the bill he gave McKnight had a bright, new appearance, like the one exhibited, and was torn and pasted across the end, like the bill introduced in evidence. Witness got the bill from J. W. Humphreys. He did not consent to the taking of the same by the defendant.

Mrs. Eliza Montgomery testified, for the State, that Mr. McKnight, the prosecuting witness, took dinner at her hotel on the seventeenth day of March, 1884. She did not remember who ate dinner with McKnight. The defendant did not come to dinner until some time after McKnight did, and was not near McKnight during the meal. There were three young men at the table at the time that McKnight ate his dinner. The witness was of the opinion that James Hicks did not take dinner at her house on that day. Witness's servant told her that McKnight went to sleep at the table. The defendant told witness that he conducted McKnight to a bed room upstairs.

W. N. Motes testified, for the State, that he received the five dollar bill on exhibition from the defendant, between eleven and twelve o'clock, on the seventeenth day of March, 1884, giving him silver for it. Witness knew the bill in evidence to be the same, by its being torn and patched at one end.

Errors in the charge of the court as given, the refusal of special charges asked, and the insufficiency of the evidence to sustain the verdict, were the grounds relied upon in the motion for new trial.

*Terhune & Yoakum*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WILLSON, JUDGE. 1. The property alleged to have been stolen is described in the indictment thus: "One twenty dollar gold piece, of the value of twenty dollars, current money of the United States, and one five dollar bill in money of the value of five dollars, and one pocket knife of the value of fifty cents, of the corporeal personal property of J. W. McKnight." A motion in arrest of judgment, based upon the supposed insufficiency of the description of the alleged stolen property, was made and overruled.

We think the indictment is sufficient. "Money" is property (Code Crim. Proc., Art. 732), and "when it becomes necessary

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Opinion of the court.

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to describe property of any kind in an indictment, a general description of the same by name, kind, quantity, number and ownership, if known, shall be sufficient." (Code Crim. Proc., Art. 427.) This last quoted Article is a new provision added by the revisers, and dispenses with the great particularity required prior thereto in the description of property, especially money. In this indictment the money is described by name, kind, quantity, value and ownership, and while this description would not perhaps be good under decisions made before the adoption of the above quoted provision, we think it is amply sufficient now.

2. Defendant excepted on the trial to the following paragraph of the court's charge to the jury, viz: "Possession of property recently stolen is evidence against the accused, which, like all other evidence, is to be taken and considered by the jury in connection with other testimony in the case." We think the exception to this charge well taken. It was not necessary for the court to charge upon this evidence separately and apart from the other evidence in the case. It was giving to it undue prominence, and especially was it improper to say to the jury that such evidence was *against* the defendant. The true rule is that "the possession of property recently stolen is merely a fact or circumstance to be considered by the jury, in connection with all the other evidence submitted to them, in determining the guilt of the possessor." (*McCoy v. The State*, 44 Texas, 618; *Watkins v. The State*, 2 Texas Ct. App., 73.) It is not always that the possession of recently stolen property is evidence *against* the possessor. It is always *admissible* evidence in a trial for theft, but it is for the *jury* and not the *judge* to determine whether it is *against* the defendant. And even when it is evidence *against* the defendant, it is of itself, unaided by other evidence, insufficient to support a conviction, and the court committed a further error in refusing to so charge when requested so to do. (*Dreyer v. The State*, 11 Texas Ct. App., 503; *McWhorter v. The State*, 11 Texas Ct. App., 584.) We think the paragraph of the charge above quoted was erroneous, and, being promptly excepted to, the error must reverse the judgment.

3. This conviction is based alone upon circumstantial evidence. The court charged in regard to this character of evidence as follows: "In order to convict on circumstantial evidence, the circumstances must be so connected as to exclude every reasonable hypothesis but the guilt of defendant." This portion

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Syllabus.

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of the charge was excepted to at the trial, because it was not sufficiently full and specific to enable the jury to understand and apply the rules applicable to circumstantial evidence. We think the exception is well taken. We are of the opinion that, when tested by the decisions, the charge does not fill the demands of the law. (*Rye v. The State*, 8 Texas Ct. App., 153; *Henderson v. The State*, 14 Texas, 514; *Hunt v. The State*, 7 Texas Ct. App., 212; *Barr v. The State*, 10 Texas Ct. App., 507.)

As the evidence in this case was not only entirely circumstantial, but was also of a rather questionable character, the principal witness for the State being, at the time of the alleged theft, in an intoxicated condition, it was very essential that the charge of the court upon circumstantial evidence should fill the full measure of the law.

4. There are other questions presented by the record, and other errors, perhaps, which would demand a reversal of the judgment, but they are such as are not likely to again occur upon another trial of the case, and we will not therefore consume time in discussing and determining them.

For the errors in the charge of the court named above, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 7, 1884.

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[No. 2873.]

## GEORGE ALLEN v. THE STATE.

16	150
36	126

**SWINDLING.**—**INFORMATION** to charge the offense of swindling must allege that some false representation as to existing facts or past events was made by the accused. Mere false promises or false professions of intention, though acted upon, are not sufficient. The information in this case charged, substantially, that defendant promised to pay one B. fifty cents for four certain fish, if said B. would deliver the same at his, defendant's, house; that B. did so deliver the fish, and that the said representations of the defendant were then and there false, etc. *Held*, that the information was insufficient to charge swindling or any other offense.



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Opinion of the court.

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APPEAL from the County Court of Palo Pinto. Tried below before the Hon. E. K. Taylor, County Judge.

The opinion states the case. A fine of fifty dollars and confinement in the county jail for a term of ten days constituted the punishment awarded by a verdict of guilty. The record brings up no statement of facts.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

WILLSON, JUDGE. The charging part of the information in this case is as follows: "That heretofore, on or about the twenty-second day of June, A. D. 1883, in the county of Palo Pinto and State of Texas, one George Allen did then and there acquire and obtain, by false and deceitful pretense and fraudulent representations, with intent to appropriate the same to the use of him, the said George Allen, the party so acquiring, four certain fish, personal property of the value of fifty cents, belonging to Gnat Bradford, by then and there representing to him, Gnat Bradford, that he, George Allen, would pay him, Gnat Bradford, fifty cents in money if said Gnat Bradford would deliver said fish at George Allen's house, which he, said Gnat Bradford, did then and there, and delivered said fish at George Allen's house, and which said representations then and there by the said George Allen made were false and untrue."

We presume that this information is based upon Article 790 of the Penal Code, and is intended to allege the offense of swindling. The facts alleged do not constitute the offense of swindling, or any other offense denounced by our Penal Code. To constitute the offense of swindling, some false representation as to existing facts or past events must have been made. Mere false promises, or false professions of intention, although acted upon, are not sufficient. (*Johnson v. The State*, 41 Texas, 65; *Mathews v. The State*, 10 Texas Ct. App., 279; 2 Bish. Crim. Law, sec. 419; *Tefft v. Windsor*, 17 Mich., 486; 3 Crim. Law Mag., p. 838; *People v. Blanchard*, 90 N. Y., 314; *Cone v. Moore*, 99 Pa. St., 570.) The information before us charges nothing more than a promise on the part of the defendant to pay for the fish when delivered at his house. It does not even allege directly that the defendant refused to pay for the fish when so delivered.

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Statement of the case.

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The judgment is reversed, and, because the information does not allege any offense against the law of this State, the prosecution is dismissed.

*Reversed and dismissed.*

Opinion delivered May 10, 1884.

16 152  
31 154

[No. 2901.]

ELOJO GONZALES v. THE STATE.

1. AGGRAVATED ASSAULT AND BATTERY—VENUE—EVIDENCE.—The record, on appeal, must show that the venue of the offense was established by evidence; otherwise a conviction cannot stand.
2. SAME—EVIDENCE.—A State's witness was permitted, over objection, to state what the prosecuting witness told him about the alleged assault the day after it occurred; and, in testifying about blood spots he saw upon the floor, to state what the prosecuting witness said to him as to how they came there. *Held*, error, as being clearly hearsay, and no part of the *res gestæ*, nor otherwise competent.
3. SAME.—The prosecuting witness having stated, on cross-examination, that she was induced by the county attorney to make complaint against the defendant in this case, it was proper to admit, on behalf of the State, evidence to rebut and contradict the witness as to such statement.

APPEAL from the County Court of Tom Green. Tried below before the Hon. Joseph Spence, junior, County Judge.

A fine of twenty-five dollars was assessed against the appellant, upon his conviction for an assault and battery upon one Ollie Clayton. The information alleged that the offense was committed on the thirtieth day of June, 1883, in Tom Green county, Texas.

Ollie Clayton was the first witness for the State. She testified that she knew the defendant, and had lived with him in his house for about three and a half years. On the morning of June 30, 1883, the witness went home very early, having been out all night the night before. She found the defendant in bed, very drunk. Defendant asked the witness where she had been all night; to which inquiry the witness replied to the defendant that it was none of his business. Thereupon defendant struck

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• Statement of the case.

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witness in the face with his hand, and kicked her on the lip with his foot. Defendant was a grown man, but witness did not know his age.

On her cross-examination, the witness said that during the quarrel she said and did a great many things to the defendant. She did not feel that she was bound to tell all that she said and did. Previous to this difficulty, the defendant had been kind and good to witness. He had never before mistrusted or ill treated her, and would not have done so on this occasion had he been sober. Witness and defendant were not married, but lived together. This witness stated, on cross-examination, that she would not have prosecuted the defendant but for the county attorney.

The testimony of James D. Spears, a witness for the State, was admitted, over objections of defendant. He stated, in substance, that the complainant came to him on Sunday morning, July 1, 1883, crying, and requested witness to keep a Mexican from beating her. Witness asked her what Mexican, and she replied: "Elojo Gonzales." Witness asked her then if Gonzales was still at the house. She replied that he was not; that he had left. She then asked witness what she could do about it. Witness asked her what she wanted to do. She replied that she wanted him arrested, and witness told her that, to secure his arrest, she would have to make a complaint against him. She went home, and witness afterward went to the house where she was staying. She showed witness some blood stains on the floor, and said that the blood came from her mouth when defendant kicked her. Defendant was not then present. Ollie said that he had gone down town.

County attorney Cassius Carter, over objection of the defendant, testified, for the State, that Ollie Clayton came to him on or about the morning of June 30, 1883, and told him that she wanted to file an affidavit against the defendant. She stated facts to witness upon which he based the affidavit first filed in the county court. Upon exceptions raised, that affidavit was dismissed, and the witness went to Ollie Clayton and told her what had been done with it, and that, if she would go with witness to his office, he would write another. She did so, and made the affidavit upon which this case is being prosecuted. She accompanied the witness and made the affidavit gladly, as though she wanted the defendant punished.

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Syllabus.

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The motion for new trial raised the questions discussed in the opinion.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** There is not a particle of evidence in the record showing the venue of the offense, and because of the absence of such evidence the conviction must be set aside.

It was error to admit, over defendant's objections, the testimony of the witness Spears as to what the prosecuting witness, Ollie Clayton, told him about the alleged assault on the day after the occurrence, and as to the blood he saw upon the floor of her house, and her statements as to how the blood came to be there. This testimony was hearsay—was not *res gestæ*—and should have been rejected. (Whart. Crim. Ev., sec. 264; 1 Greenl. Ev., sec. 110.)

The prosecuting witness, Ollie Clayton, having testified on cross-examination by the defendant that she was induced by the county attorney to make the affidavit against defendant, upon which this prosecution is based, we think it was proper to admit evidence on the part of the State rebutting and contradicting this statement. The judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered May 10, 1884.

16 154  
29 235

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[No. 2874.]

**DANIEL ZWEIFEL v. THE STATE.**

**SALE OF LIQUORS ON ELECTION DAY.**—INDICTMENT for the sale of liquors on election day which fails to charge that the election was held in the precinct, village, town or city of the defendant, or to charge where the liquor was sold, is insufficient to charge the offense denounced by Article 178 of the Penal Code.

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Opinion of the court.

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APPEAL from the County Court of Comanche. Tried below before the Hon. L. H. Brewer, County Judge.

The opinion sets out the charging part of the indictment. A fine of one hundred and twenty-five dollars was the penalty imposed by a verdict of guilty.

The errors complained of in the motion for new trial, were that the court gave a verbal charge, and failed to give a written charge.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

HURT, JUDGE. This is a conviction for selling liquor on election day.

The indictment alleges that defendant sold liquor on the seventh day of November, 1882, said day being then and there a day of general election for county and State officers, and that said election was *then* and *there* held, etc. There is no allegation that the election was held in the precinct, village, town or city of the defendant, or where the liquor was sold. It is simply charged in the indictment that an election was held in the county. Is the indictment sufficient? Clearly it is not. (Art. 178, Penal Code.)

Because the indictment is defective, the judgment is reversed and the prosecution dismissed.

*Reversed and dismissed.*

Opinion delivered May 10, 1884.

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Opinion of the court.

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[No. 3026.]

JOHN BURTON *v.* THE STATE.

1. **DISORDERLY HOUSE—VENUE—PRACTICE.**—Transcript on appeal must show affirmatively that the venue of the offense was proved on the trial. Otherwise, a conviction cannot stand.
2. **SAME.**—While the fact that the character of a house as a disorderly house, and that it is kept for the purpose of prostitution, may be proved by general reputation, such proof is inadmissible to prove that a person charged is the keeper of such house.

**APPEAL** from the County Court of Mitchell. Tried below before the Hon. J. W. Pierson, County Judge.

The opinion discloses the nature of the case. A fine of one hundred dollars was the penalty assessed against the appellant by a verdict of guilty.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

**HURT, JUDGE.** Appellant was convicted of keeping a disorderly house for the purpose of public prostitution. We are not informed by the statement of facts in what county the house was situated, charged to have been kept by defendant. There is no evidence tending to prove that the offense was committed in Mitchell county, the county of the prosecution. This is fatal to the conviction.

Upon the trial no witness swore that the defendant was the keeper or proprietor of the house. The prosecution proved that defendant was the proprietor or keeper, by general report and rumor. This character of testimony was not only insufficient, but clearly inadmissible. (*The State v. Hand*, 7 Iowa, 411; *Allen v. The State*, 15 Texas Ct. App., 320.)

It is well settled that proof by general reputation that the house is kept for purposes of prostitution, is both admissible and sufficient to establish its character as a disorderly house. But such proof is not competent to establish that a certain person is the proprietor or keeper of the house.

## Statement of the case.

Because there is no proof of venue, and because the evidence fails to establish the fact that defendant was the keeper or proprietor of the house, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 10, 1884.

[No. 2009.]

## F. AND M. HAROLD v. THE STATE.

16	157
38	656

1. **CONSTRUCTION OF STATUTES—REPEAL.**—Though a subsequent statute on a given subject be not repugnant in all its provisions to a prior one on the same subject, yet if it clearly appears that the later statute was intended to prescribe the only rules which should govern the subject, the effect of the later statute is to repeal the former.
2. **SAME.**—When a subsequent statute, revising the subject matter of a former one, is evidently intended as a substitute for it, although it contains no express words to such effect, it must be held to operate to repeal the former to the extent to which its provisions are revised and supplied.
3. **SAME.**—When a statute is revised, or one act is framed from another, some parts being omitted, the parts so omitted cannot be revived by construction, but are to be considered as annulled.
4. **SAME.**—It is true that a construction which repeals a former statute by implication is not favored, and it is equally true that statutes in *part materia*, and relating to the same subject matter, are to be considered together; nevertheless it is a universal rule that when the new statute, in itself, comprehends the whole subject, and creates a new, entire and independent system respecting the subject matter, it repeals and supercedes all previous systems and laws respecting the same subject matter.
5. **SAME—INFECTIOUS DISEASES AMONG ANIMALS—PROTECTION OF WOOL GROWERS.**—Under the rules of construction announced, it is held that Article 694 of the Penal Code was repealed by the "Act for the protection of the wool growing interests of the State of Texas," passed April 4, 1883.

**APPEAL** from the County Court of Callahan. Tried below before the Hon. W. H. Cliett, County Judge.

The prosecution and conviction in this case were based upon an information charging the appellants with the violation of Article 694 of the Penal Code, in that they permitted a certain

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Opinion of the court.

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herd of their sheep, affected with scab, to run at large, in charge of a herder, upon land not their own. The appellants were fined one cent and costs.

No brief for the appellants has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

HURT, JUDGE. This conviction was obtained under Article 694, Penal Code, which reads: "If any person owning or controlling sheep affected with the scab, or other infectious or contagious disease, shall permit such sheep to run at large or in charge of any one beyond the limits of his own land, he shall be fined not exceeding one thousand dollars." Is this Article in force? or, has it not been repealed by the "Act for the protection of the wool growing interests of the State of Texas," passed April 4, 1883?

We are of the opinion that, under the following well settled rules of construction of statutes, Article 694, Penal Code, is repealed in those counties of the State in which the subsequent act is made operative.

If a subsequent statute be not repugnant in all its provisions to a prior one, yet, if the later statute was clearly intended to prescribe the only rules which should govern, it repeals the prior one. So a subsequent statute revising the subject matter of the former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former, to the extent to which its provisions are revised and supplied. And when a statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not revived by construction, but are to be considered as annulled.

While it is true that a construction which repeals former statutes by implication is not to be favored, and it is also true that statutes *in pari materia* and relating to the same subject are to be taken and considered together, still, when the new statute in itself comprehends the whole subject and creates a new, entire and independent system respecting the subject matter, it is universally held to repeal and supercede all previous systems and laws respecting the same subject matter. (*Stirman v. The State*, 21 Texas, 734; *Etter v. Missouri Pacific Railway Company*, Texas Law Review, vol. 2, No. 23.)



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Syllabus.

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We are of the opinion that this last Article was intended to, and did, comprehend the entire subject matter, and creates a new, entire and independent system of laws relative to the protection of the wool growing interests of the State, and that it repeals Article 694 of the Penal Code in the counties in which said act is operative, the county of Callahan being one of said counties.

This being our view of the effect of the act of April, 4, 1883, it follows that this conviction is without support in law, and that the judgment must be reversed and the prosecution dismissed.

The judgment is reversed and the prosecution ordered to be dismissed.

*Reversed and dismissed.*

Opinion delivered May 10, 1884.

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[No. 2892.]

W. C. THOMPSON v. THE STATE.

1. **DISTURBING RELIGIOUS WORSHIP—INDICTMENT.**—There must be some particularity, or what the law calls certainty, in an indictment. The particular act of which the State complains must be set forth in plain and intelligible words, so that the party who is accused may know what he is called upon to answer, and may be able to prepare for his defense. The indictment in this case charges the defendant with wilfully disturbing a congregation assembled for religious worship, but fails to allege the means or manner by which he disturbed the congregation. *Held*, that the indictment is bad, for uncertainty, wherefore the motion to quash the same should have been sustained.
2. **SAME.**—While in charging the offense of disturbing religious worship it is necessary that the means or manner of disturbance be alleged, it is not essential that the indictment enter into details. A general statement, as that it was effected by loud talking, swearing, whistling, etc., as the case might be, is sufficient.
3. **SAME.**—The statute in force when the case of *Kindred v. The State*, 83 Texas, 67, was decided, in which an indictment similar to this was held sufficient, and the statute now in force (Penal Code, Article 280), are materially different, and the *Kindred* case is no longer authority upon the question.

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Opinion of the court.

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APPEAL from the County Court of Jack. Tried below before the Hon. T. M. Jones, County Judge.

The opinion discloses the substance of the indictment. A fine of twenty-five dollars was the punishment imposed by a verdict of guilty.

The sufficiency of the indictment to charge the offense was the question relied on at the trial. The action of the court in overruling the motion to quash the same, and the sufficiency of the evidence to sustain the conviction, were the grounds relied upon in a motion for new trial. In so far as the evidence indicated a disturbance of the meeting, it tended to show that it was disturbed by loud talking.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

WILLSON, JUDGE. "There must be some particularity, or what the law calls certainty, in an indictment. The particular act of which the State complains must be set forth in plain and intelligible words, so that the party who is accused may know what he will be called upon to answer, and may be able to prepare for his defense." (*Alexander v. The State*, 29 Texas, 495.) By the indictment in this case, the defendant was informed that he was called upon to answer the charge of wilfully disturbing a congregation assembled for the purpose of religious worship, but he was not informed by what means or in what manner he caused the disturbance. He is not told whether it was by loud or vociferous talking, or by swearing, hissing, laughing, fighting, discharging fire arms, or by any other specified means. Upon the well settled general principles of the law governing indictments, we are of the opinion that this indictment is bad, for uncertainty. (Code Crim. Proc., Art. 420, sub. 7; Art. 422; *Brush v. The Republic*, 1 Texas, 455; *Lewellen v. The State*, 18 Texas, 538; *Williams v. The State*, 14 Texas, 98; *Lagrone v. The State*, 12 Texas Ct. App., 426.)

The precise question presented in this case has been determined by the Supreme Court of Arkansas, in cases arising under a statute in all material respects similar to ours. It is there held that the indictment for this offense must allege the *manner* of the disturbance, as well in order that it may be determined

## Opinion of the court.

whether or not the statutory offense has been charged, as that the accused may know the "nature and cause of the accusation against him." (*The State v. Minyard*, 12 Ark. (English), 156; *The State v. Hudson*, 31 Ark., 638.) It is further held that it is not necessary, in charging the manner of the disturbance, to enter into details. A general statement, as that it was effected by "loud talking," "swearing," "discharging fire arms," "whistling," "fighting," or the like, would be sufficient. We think the Arkansas decisions we have cited are correct, and are well supported by the general principles of law.

We have found no authority in conflict with them, except the case of *Kindred v. The State*, which is a decision by the Supreme Court of this State, but made under a statute materially different from the one now in force. That decision held that an indictment substantially the same as the one before us was good. No authority was cited, and no reason advanced in support of the conclusion of the court, except that the indictment followed the language of the statute. (*Kindred v. The State*, 33 Texas, 67.) Without either questioning or conceding the correctness of that decision, it is sufficient to say that we do not regard it as authority in this case, because it was made with reference to a statute materially different from the one under which this conviction was obtained. (Penal Code of 1856, Art. 284; Pas. Dig., Art. 1904; Rev. Stat., Art. 180; Acts of Eighteenth Leg., p. 17.)

It was rendered at a time when the Article 284 of the original Penal Code was in force, and that Article, unlike the subsequent amendments of it, did not name any means or manner of the commission of the offense. We hold that the case of *Kindred v. The State* is no longer an authority with reference to an indictment under our present statute for the offense of disturbing religious worship.

Because the court erred in overruling the defendant's exception to the indictment, and because the indictment is bad, the judgment is reversed and the prosecution dismissed.

*Reversed and dismissed.*

Opinion delivered May 14, 1884.

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Syllabus.

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[No. 2879.]

## CHARLEY ADAMS v. THE STATE.

1. **ILLEGAL BRANDING OF STOCK—FORMER CONVICTION—PRACTICE—CASE STATED.**—To a prosecution for illegal branding of cattle, the defendant, in addition to his plea of not guilty, interposed a special plea of a former conviction for the same offense in the same court. This special plea was defective, in that it failed to set out the record of conviction, and did not specifically allege the identity of the person convicted and the offense of which he was convicted. These defects, however, were not excepted to at the trial, and the defendant was permitted, without objection, to introduce testimony in support of the plea. In support of the plea, the defendant proved that at the time and place that he marked and branded the animal involved in this prosecution, he also marked and branded another yearling, whose owner was unknown, for which last act he had been indicted, tried and convicted. This proof was made by oral testimony, and the record of conviction was not, as it should have been, read in evidence. To this, however, the State made no objection. *Held*, that, under the circumstances, the evidence must be considered, as it is brought up in the record.
2. **SAME.**—It is well settled, in cases of theft, that the stealing of different articles of property, belonging to different persons, at the same time and place, so that the transaction is the same, is but one offense against the State, and the accused cannot be convicted on separate indictments charging different parts of one transaction, as if they were distinct offenses, as a conviction on one of the indictments bars a prosecution on the other. *Held*, that the same rule applies to the offense of illegal marking and branding stock.
3. **SAME—CHARGE OF THE COURT.**—With respect to the question involved, the concluding part of the charge of the court instructed the jury, in effect, if the marking and branding of one of the animals was done, perfected and completed by one act and transaction, and, after such completion, the other animal, if it belonged to a different owner, was, by a different act, marked and branded, it would be a different transaction and offense, although the branding and marking may have been done near the same time and place. *Held*, error, in view of the rule announced and the evidence in this case. See the opinion *in extenso* for the charge at length, and for an elucidation of the question.
4. **SAME.**—Upon the same issue, the defendant requested the court to charge the jury as follows: "If you believe, from the evidence in this case, that the animal charged to be illegally marked and branded, in this case, was marked and branded at the same time and place as the animal charged to have been illegally marked and branded in the indictment in case No. 622, on which indictment the defendant has been tried and convicted, so as to make the marking and branding of the two animals one

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and the same transaction, or part of the same transaction, then, if the jury so believe, they will find the special plea of defendant true." *Held*, that the requested charge embodied the correct rule upon the subject, and its rejection was error.

5. **SAME—PRACTICE—EVIDENCE.**—Over objection, the State was permitted to read in evidence the defendant's application for an attachment for certain witnesses, in which application he stated facts which he expected to prove by the absent witnesses, and which facts constituted a different defense than that he urged on the trial. This application was sworn to by defendant when he was confined as a prisoner in jail, and he was not cautioned that it might be used against him. *Held*, that, under such circumstances, the application for attachment was erroneously admitted in evidence.

**APPEAL** from the District Court of Comanche. Tried below before the Hon. W. A. Blackburn.

The indictment in this case charged that the appellant illegally marked and branded a certain yearling of the neat cattle kind, the property of some person to the grand jury unknown, in the county of Comanche, State of Texas, on the fifteenth day of April, 1881. He was convicted, and his punishment affixed at a term of two years in the penitentiary.

Thomas J. Hanson was the first witness introduced by the State. He testified that he was acquainted with defendant and William Howell on or about April 15, 1881. The witness, defendant, Bill Howell, Scott Groves, Rufus Mahan and a number of others were present at a cow herd at Onion valley, on the Leon river, in Comanche county, on that day. This herd belonged to some northern cow hunters. After leaving the cow herd, the party separated, to make a drive up the creek in squads. The agreement was to drive all cattle belonging to any of the party, pen the same at the witness's pen, and there divide them. Some of the party went on one side, and some on the other side of the creek. When the witness got to his pen, he found that it contained a small bunch of cattle, including two unmarked and unbranded yearlings. One of these yearlings was a white, black headed, and the other a dark red heifer yearling. The witness did not know who penned the cattle. Mr. Harbison, the defendant, Bill Howell, S. W. Groves, Rufus Mahan, Jesse Williams and a number of other parties were at the pen. The parties indulged largely in jest about the unmarked and unbranded animals. Harbison had some cattle in the pen. These were being cut out, and the yearlings started out with

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them. Bill Howell stepped in front of them and said: "Charley and I want these. They are ours." Defendant added: "Yes, we will take care of them." Either the defendant or Howell then said: "If we do not take them, the northern cow drivers will." Some one then remarked to Harbison: "When you have been in the cow business as long as I have, you will learn not to let such cattle as these (referring to the unmarked yearlings) go by."

The yearling involved in this prosecution belonged to a white cow with a brown head. The mother cow was branded with a cross on the hip, and was marked with a crop off the right ear and an over and underbit in the left ear. This cow the witness had known in the neighborhood as an estray for two or three years, and had known the yearling for at least twelve months. The yearling, the witness knew, was calved in the range, and was past a year old when penned on the occasion referred to. No one in the county claimed her that the witness had ever heard of. The defendant, after the occurrences at the pen, drove the mother cow off the range, but returned and remained until some one else took her away. The two unmarked and unbranded yearlings were turned out, and were driven from the witness's pen with Mr. Harbison's cattle. The defendant, Bill Howell, Groves and Mahan went off with them, as well as the witness remembered.

The witness saw these two yearlings, next after that, at his pen, on the first or second day after they were driven off with Harbison's cattle. They had been marked and branded in the interim, in a mark and brand that the defendant had purchased about a month before. At this time, they were in charge of defendant, Howell Groves and Mahan. The parties named drove them from the witness's pen, toward the town of Comanche, on or about April 15, 1881. This white heifer was first put in the witness's pen on the evening preceding the penning of the bunch of cattle on the day of the drive. It was penned, roped and tied up by the defendant and William Howell. It made its escape in some manner that evening or night, and was penned again on the next day with the bunch of cattle. Witness's pen and that of Mrs. Adams are in the county of Comanche, State of Texas.

W. P. Harbison was the next witness for the State. He testified that he saw the defendant, with Hanson and the other parties named by Hanson, and several others, at the northern cat-

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the herd, in Onion valley, on the Leon river, in Comanche county. This party made a drive to Hanson's pen, one squad going up one side, and another up the other side of the creek. The understanding was that all the cattle within the scope of the drive were to be penned, and those not owned by any of the party were to be cut out and returned to the range. The bunch collected by the witness's party was driven up to the back of the pen. While this bunch was being held at this point, or just before the pen was reached, an unmarked, unbranded white heifer yearling, with a black head, ran from the bottom into the bunch. After the other party penned their bunch, the witness and his party drove their bunch around the gap and penned them.

The party present numbered fifteen or twenty men, including those named by Hanson. Witness saw two unmarked and unbranded yearlings in the pen; the one described and a red heifer yearling with dark points. When the cutting out commenced, the witness asked who claimed the two unmarked yearlings. Howell said: "Charley and I want them; they are ours." Defendant said: "We will take care of them." Witness remarked: "I want it distinctly understood that I have nothing to do with them. I will have nothing to do with any unmarked and unbranded cattle." Some one of the party said something to the effect: "If we don't take them, the northern cattle men will." Some one else remarked: "When you have been in the cattle business as long as I have, you will learn to take care of such cattle as these," meaning the unmarked yearlings. The cattle were all turned out and driven to, and penned in, Mrs. Adams's pen. Witness's cattle were then cut out and turned out from Mrs. Adams's pen. Defendant, Bill Howell and several others were along, helping to drive the cattle. They were, however, together with Groves and Mahan, left at Mrs. Adams's pen, when witness drove his cattle home from the pen. These two yearlings were driven and penned at Mrs. Adams's pen together and at the same time. They were unmarked and unbranded when penned at Mrs. Adams's. When first penned at Hanson's, these yearlings were unmarked, unbranded, and were generally considered estrays.

Red Stone testified, for the State, that he knew the yearling involved in this prosecution, and knew its mother. They were estrays, and were so regarded in the neighborhood.

G. A. Beeman testified, for the State, that in the spring of 1882 he made a contract with the defendant to purchase a num-

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ber of cattle. Defendant delivered about thirty head of cattle on that contract, which were received for the witness by C. C. Campbell. The defendant executed a bill of sale to the witness, at the bank of Hill, Moore & Co., in the town of Comanche. The witness remembered that in the bunch of cattle there was a white heifer yearling with a black head.

Jesse Williams testified, for the State, that he was at Hanson's cattle pen in the spring of 1881, and there saw the two heifer yearlings described by previous witnesses. These yearlings, the witness understood, were estrays. Either the defendant or Bill Howell claimed them. They were turned out of that pen and driven off with Mr. Harbison's cattle.

It was proved by the State, and admitted by the defense, that the defendant forfeited his bail bond in this case at the September term, 1882.

Sheriff Cox testified that he had made diligent search for the defendant since the last general election, but failed to find him in the county. Defendant was arrested in Erath county in June, 1883.

Two or three members of the grand jury who found the indictment in this case testified that, while the case was under consideration, the grand jury made diligent and unsuccessful search for the owner of the two heifer yearlings described. The State closed.

W. S. Groves was the first witness for the defense. He testified that he and the defendant were brothers-in-law. Witness was at Hanson's cattle pen on the occasion referred to by the previous witnesses. He saw the parties named by the other witnesses, and several other parties, at the pen on that occasion. He also saw at that time and place the two yearlings described by the other witnesses. The bunch of cattle in the pen at that time numbered fifteen or twenty head. Considerable talk about the unmarked yearlings was indulged in by the parties. The two yearlings were turned out with Mr. Harbison's cattle, and were driven with them to Mrs. Adams's pen. Harbison took his cattle on home, and the two yearlings were left in Mrs. Adams's pen. Rufus Mahan left Mrs. Adams's that night, but witness remained. Next morning Mahan came back. He was going to the pen on foot when witness first saw him. On that morning, the next after they were penned at Mrs. Adams's, Mahan, defendant and witness marked and branded the yearlings at the same time and place. The branding iron was not put on



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each yearling at the same instant of time, but one was first roped, thrown down, marked and branded, and then the other was similarly treated. There was no intermission or suspension of the work. The last yearling was branded and marked as soon as the first was turned loose, after being marked and branded. The yearlings involved in this statement were the red one for the marking and branding of which the defendant was tried and convicted on the day preceding this trial, and the white one for the marking and branding of which defendant was now on trial. The marking and branding of the two was done at the same time and place as stated. After these two yearlings were marked and branded, the defendant and Bill Howell, Rufus Mahan and the witness, drove them to the town of Comanche and sold them to Mr. Beeman. Hill, Moore & Co. paid for the yearlings. The defendant executed a bill of sale. The marks and brands put on the yearlings were those of the defendant. In driving them to the town of Comanche, a distance of twelve miles, the public road was traveled.

Continuing his evidence, the witness testified that he was in the town of Dublin in February, 1881, and at that time in that town met with the defendant, Rufus Mahan, William Whittenburg and Thomas Roberson. At that time he heard a trade between the defendant and Roberson. Roberson sold the defendant a white cow with a black or brown head, and her yearling, then running on the range. The cow was branded on the hip with a cross. Witness did not remember the mark in which she was said to be. The cow's range was said to be on Leon river. The witness had previously seen the cow and yearling and knew where she ranged. A bill of sale was executed by Roberson to the defendant, which conveyed to him the cow and yearling for the consideration of fifteen dollars, which was paid by the defendant to Roberson. Pressed on this point, the witness stated that he did not see the payment of the money, and did not know whether it was paid in greenbacks or specie. He only knew that a consideration of fifteen dollars was named in the bill of sale. William Whittenburg and Thomas Bibee were witnesses to the bill of sale. Bibee then lived in Erath county, but the witness did not know his present whereabouts. He did not know where Roberson now lives, but at the time he executed the bill of sale he lived in Dublin. The witness had not seen Roberson for twelve months or more. Witness did not know whether or not the bill of sale was ever acknowledged for rec-

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ord. About two months before this time, the witness received this bill of sale from the hands of the defendant's wife, but had lost it. The witness got the bill of sale to use on this trial, and put it with a number of other papers of the defendant placed in his charge, but when he came to look for it to bring it to court, he could not find it.

Rufus Mahan was next introduced as a witness for the defense. He testified that he was at Hanson's cattle pen when Harbison's cattle were penned there in April, 1881. A number of persons, including those named by previous witnesses, were present at the time. The bunch of cattle included the two yearlings described. They were turned out with Harbison's cattle, and with them were driven to Mrs. Adams's pen. Harbison's cattle were driven on home, and the two yearlings were left in Mrs. Adams's pen. Groves and witness stopped at Mrs. Adams's and after dinner went on another cow hunt. Howell went home that night. Defendant and witness passed the night at Mrs. Adams's. Witness did not see Bill Howell next day. On the day after the yearlings were penned at Mrs. Adams's, defendant, witness and Groves marked and branded them, in the pen, putting them in defendant's mark and brand. They were marked and branded at the same time and place.

This witness testified that he was present in Dublin when defendant made a trade with Thomas Roberson for a cow and yearling. He described the cow and yearling exactly as did the witness Groves, and gave exactly the same account of that transaction throughout.

William Whittenburg was the next witness for the defendant. He testified that he knew the defendant and one Thomas Roberson. He saw these two parties in the town of Dublin sometime in February or March, 1881, and as a witness he signed a bill of sale executed by Roberson to defendant, which bill of sale, reciting a consideration of eighteen dollars, conveyed to the defendant a white cow with a black or brown head, and her yearling. The cow's brand, as recited in the bill of sale, was a cross on the hip. The mark was also given, but the witness did not remember what it was. The cow and yearling were then said to be on the range on the Leon river. Thomas Bibee also signed the bill of sale as a witness. This bill of sale was made out at Steward's store, in Dublin, Erath county, Texas. Witness saw no money pass between the parties. Witness did not know the

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present whereabouts of Roberson and Bibee. The defense closed.

The State read in evidence, over objection, an application for attachment taken out by the defendant. It recited that the defendant expected to prove by the witness named in the application that Bill Howell drove the yearling to the defendant's pen, and requested the witness to take care of it. The reception of this evidence is the subject matter of the fifth ruling of this report.

In addition to the questions considered in the opinion, the motion for new trial denounced the verdict as unsupported by either law or evidence.

*Lindsay & Hutchison*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** This conviction was had upon an indictment which charges the defendant with the offense of unlawfully and feloniously marking and branding one yearling of the neat cattle species, not being his own property, but the property of some person to the grand jurors unknown, without the consent of the owner, and with intent to defraud.

In addition to the plea of not guilty, the defendant pleaded, specially, a former conviction for the same offense in the same court. This special plea was defective, in that it failed to set out the record of conviction, and did not specifically allege the identity of the person convicted, and the offense of which he was convicted. (*Williams v. The State*, 13 Texas Ct. App., 285.) It was not excepted to, however, by the State, and, upon the trial, the defendant was permitted, without objection, to introduce evidence in support of it.

It was proved, in support of the plea, that, at the same time and place that the defendant marked and branded the yearling involved in this prosecution, he also marked and branded another yearling, whose owner was to the grand jurors unknown, and that the defendant had been indicted, prosecuted and convicted, in the same court in which this trial was pending, for illegally marking and branding said last named yearling. This proof was made by oral testimony, and, strange to say, the record of said conviction was not read in evidence; at least, it does not appear that it was from the transcript before us. No

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objections, however, were made by the State to any evidence offered by the defendant in support of his plea, and we shall therefore consider the evidence as we find it in the statement of facts.

In instructing the jury upon defendant's special plea, the learned judge used the following language: "It devolves on the defendant to prove the allegations in his special plea, and, to sustain this plea, the proof must satisfy you that the offense upon which he has been convicted and the one now charged are but one and the same offense, committed at one and the same time, by one and the same act, or that the two charges constitute but parts of one and the same transaction, committed at one and the same time. If these facts are proved to your satisfaction, then you need not pursue your inquiries any farther, but will find the special plea to be true. But, if you find that the two animals were taken at different times, by different acts, and marked and branded separately, at different times, by different acts, and that the marking and branding, if any, of one of the animals was done, perfected and completed by one act and transaction, and, after such completion, the other animal, if it belonged to a different owner, was, by a different act, marked and branded, it would be a different transaction and offense, if offense at all, although the branding and marking may have been done near the same time and place."

Defendant requested the court to give the following special charge, which was refused, viz.: "If you believe from the evidence in this case that the animal charged to be illegally marked and branded, in this case, was marked and branded at the same time and place as the animal charged to have been illegally marked and branded in the indictment in case number 622, The State of Texas against Charley Adams, on which indictment the defendant has been tried and convicted, so as to make the marking and branding of the two animals one and the same transaction, or part of the same transaction, then, in that event, if the jury so believe, they will find the special plea of defendant true."

It is well settled, in cases of theft, that the stealing of different articles of property, belonging to different persons, at the same time and place, so that the transaction is the same, is but one offense against the State; and the accused cannot be convicted on separate indictments, charging different parts of one transaction as if they were distinct offenses, as a conviction on

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one of the indictments bars a prosecution on the other. (*Wilson v. The State*, 45 Texas, 76; *Quitow v. The State*, 1 Texas Ct. App., 47; *Hozier v. The State*, 6 Texas Ct. App., 512; *Hudson v. The State*, 9 Texas Ct. App., 151; *Addison v. The State*, 3 Texas Ct. App., 40; *Hirshfield v. The State*, 11 Texas Ct. App., 207.) We think this rule applies in this case with the same force and to the same extent as it would apply in a case of theft. We can perceive no reason why it should not. We think the court erred in the latter portion of the charge quoted, whereby the jury were instructed that if the marking and branding of one of the animals was done, perfected and completed by one act and transaction, and after such completion the other animal, if it belonged to a different owner, was by a different act marked and branded, it would be a different transaction and offense, although the branding and marking may have been done near the same time and place. This portion of the charge is in conflict with what we understand to be the law, and was not, in our opinion, applicable to the evidence before the court.

It mattered not whether one yearling was marked and branded first, or whether both were marked and branded at the same instant of time, and on the same identical spot of ground. The true inquiry was, did the marking and branding of the two yearlings in fact constitute one and the same transaction, although accomplished by separate acts? Suppose the defendant had been charged with the theft of the yearlings, and the proof had shown that he took them from a pen, that he drove one of them out of the pen, and turned and immediately, but by a different act, drove out the other; would not this be the same transaction and but one offense? We think in such case a conviction of the theft of one of the yearlings would be a bar to an indictment for the theft of the other, and that it would make no difference that the yearlings were owned by different persons. (*Hudson v. The State*, 9 Texas Ct. App., 151.)

In our opinion the special charge asked by the defendant and refused by the court was correct, and applicable to the evidence, and should have been given in place of the objectionable portion of the charge given by the court. It was plainly proved that the two yearlings were marked and branded by the defendant at the same time and place. As soon as one yearling had been marked and branded the other was marked and branded, without the lapse of any such time as would constitute the acts separate and distinct transactions, and without any change of

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Syllabus.

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place. It is clear to our minds from the evidence, and the well settled principles of the law, that the marking and branding of the yearlings was but one and the same transaction and constituted but one offense.

Upon the trial the State, over the objections of the defendant, read in evidence an application which defendant had made for attachments for certain witnesses, in which application he had stated the facts he expected to prove by said witnesses, which facts constituted a defense different from the one urged by the defendant on the trial. This application was sworn to by the defendant, and at the time he made the same he was a prisoner confined in jail, and was not cautioned that it might be used against him. It was error to admit this testimony, and the same was well calculated to influence the verdict of the jury unfavorably to the defendant, as the facts therein stated were shown upon the trial to be untrue. (*Austin v. The State*, 15 Texas Ct. App., 388.)

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 14, 1884.

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[No. 3097.]

SAM. LANE v. THE STATE.

1. MALICIOUS MISCHIEF—INFORMATION.—See the statement of the case for a complaint *held* sufficient to charge the offense of wilfully killing a horse with intent to injure the owner; wherefore a motion to quash the same was properly overruled.
2. PRACTICE—CONTINUANCE—DILIGENCE.—Not only must an application for a continuance show the materiality of the absent testimony, in order to be sufficient, but it must show the exercise of due diligence to secure it on the trial. The continuance in this case was properly refused.
3. SAME—CHARGE OF THE COURT—INTENT—PRESUMPTIONS.—Upon the question of intent, the court charged as follows: "The intent to injure the owner is the gist of this offense, but such intent may be presumed from the fact of the killing." Again: "If you find that defendant killed the horse mentioned in the complaint, you may, from that fact, presume that such killing was done with intent to injure the owner, if, from all the facts and circumstances of the case, it is, in your judgment, proper for you to do so." *Held*, correct, in view of the provision in Article 679 of

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the Revised Penal Code, which has, with reference to this offense, changed and reversed the previous rule on the subject, and authorized the presumption of intent from the perpetration of the act. See the opinion *in extenso* on the subject.

4. SAME—CONSTRUCTION OF A TERM—EVIDENCE.—When used in a penal statute, the word “wilful” means more than it does in common parlance. It means with “evil intent,” or “legal malice,” or “without reasonable ground for believing the act to be lawful.” In common parlance it is used in the sense of intentional, as distinguished from an accidental or involuntary act. In order, then, to have made the killing of the horse wilful, it must have been committed with evil intent, with legal malice, and without legal justification. See the statement of the case for evidence *held* insufficient to disclose an evil intent on the part of the defendant.

APPEAL from the District Court of Llano. Tried below before the Hon. J. C. Townes.

The conviction of the appellant was for the wilful killing of a horse, the property of one J. A. Swanson. The first head note of this report relates to the sufficiency of the complaint. That instrument reads as follows:

“In the name and by the authority of the State of Texas:

“Before me, the undersigned authority, this day personally appeared J. A. Swanson, a credible citizen of Llano county, who, after first being by me duly sworn, upon oath, says that, upon information and belief, that one Sam. Lane, in the county of Llano and State of Texas, and on or about the sixth day of April, 1882, did then and there, wilfully and knowingly kill one animal of the horse species, of the value of fifty dollars, the property of affiant, with intent upon the part of him, the said Sam. Lane, to injure the owner thereof, against the peace and dignity of the State.

“J. A. SWANSON.

“Sworn to and subscribed before me this the eighth day of April, 1882.

“J. S. ATCHISON, J. P.,  
“Precinct No. 1, Llano Co., Texas.”

A fine of ten dollars was the punishment imposed.

William Rawls, the first witness for the State, testified that he was in the employ of the defendant in April, 1882, and was living at his house at the time that he is charged to have killed

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the horse. Some time between midnight and day, on the night the horse was killed, the witness was awakened by horses running around the house. A few minutes later, the witness heard the report of a gun. Presently the defendant came into the house and said that he had shot that horse; that he was sorry, but that he had to shoot him.

On cross-examination, the witness said that the horse shot by defendant was an iron gray stallion, about two years old. The horse had been in the neighborhood, when shot, some five or six days. Witness did not know to whom he belonged. He had been annoying and injuring defendant's mares before that night. He had been particularly troublesome to a certain mare with a young colt, that belonged to the defendant, and the defendant had made many inquiries as to who owned him. The witness did not know how long the horses had been running on the night of the shooting. He was awakened by the noise they made running around the house. The defendant came into the house after the shooting, and said that he had shot the stud; that he was sorry he had to do it, but that he could not help it, as the stud was running his mare and colt; that he had ineffectually tried to catch him, or to run him away. He said that he had to kill the stud to save his own property, as he was certain, if he did not, that the stud would kill his colt. The defendant was a poor man, owning but two mares and colts, one of the colts being but a few weeks old. It was this colt and its mother that the stud persistently ran. The defendant plowed this mare all day on the day preceding the night of the shooting. She was so lame on the day after the shooting that she was unable to work. Defendant owned no work animals other than the two mares. This mare, the mother of the young colt, was bruised up and stiff on the morning after the shooting. She had a fresh cut on her hind leg, which looked like it had been inflicted by the hoof of a horse. The colt was also bruised and stiff on the morning after the shooting. Neither the mare nor the colt was hurt, bruised or stiff, but were perfectly sound, when turned out on the evening before. The defendant had no pasture, and always turned his stock outside to graze at night.

Re-examined, the witness stated that he was a witness on the trial of this case in the justice's court. He left Llano county shortly after that trial, and was brought back, under attachment, to testify as a State's witness on this trial.

J. A. Swanson, the next witness for the State, testified that



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on or about the eighth day of April, 1882, he heard of the killing of one of his horses, and went to look for him. He found the dead body of the horse about two hundred and fifty yards from the defendant's house. The horse had a hole in his side, which the witness took to be a gunshot hole. He saw where the horse had been dragged on the ground, and he and his brother, who was with him, followed this trail back to a point about forty or fifty yards from defendant's house, where blood on the ground showed that the horse had died. The defendant came up to the body of the horse, where the witness and his brother were, and witness asked him what he was going to do about the killing of the horse. Defendant replied that he was going to do nothing. The witness was of the opinion that the defendant did not deny that he killed the horse, but would give the witness no satisfaction about it.

The horse killed was an iron gray stud, two years old, the property of the witness, and was worth fifty dollars. He ran with the witness's horses, and had never been troublesome, but, on the contrary, was gentle. A short time before he was killed, the witness had him thrown down for the purpose of castration, but found that he had not dropped his stones, for which reason witness postponed castration. A short time after this, witness missed him from his range and bunch of horses, and saw no more of him until he found him dead, four or five days later. Witness, on one occasion, saw this stud in a field with Brown May's mare, but he took no notice of the proximity of the mare. This horse had never been vicious. Witness and defendant lived two miles apart, and witness's land ran behind that of defendant.

Cross-examined, the witness stated that his brother, William Swanson, was with him when he found the dead body of his horse. The defendant did not deny the killing of the horse, and, when asked what he intended doing about it, merely replied: "Nothing." Witness had no intimate acquaintance with defendant, but had seen him several times, and knew him when he saw him. He had never had any business transactions with defendant; had had no hard or ill feelings toward him, and knew of no hard or ill feelings against himself entertained by the defendant. If defendant had such feelings, he had no just cause for them. Their incidental relations had always been pleasant and friendly. Witness did not know the character or disposition of the horse when off his accustomed range, or away from his usual

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bunch of horses. He was off his accustomed range a short distance when killed. The State closed.

Mrs. David Thompson testified, for the defense, that she knew defendant, and lived within a quarter of a mile of him at the time of the killing of the Swanson horse. On the night of the killing, witness heard a gun fire, and presently heard horses running by her house, as though something or somebody was after them.

W. T. Swanson testified, for the defense, that he was a brother of J. A. Swanson, the owner of the horse that was killed. He had but little acquaintance with the defendant, and had never had a business transaction with him. He had never had a difficulty with the defendant; no hard feelings had ever existed between them, and he knew of no difficulty or hard feelings between defendant and J. A. Swanson. Witness was with his brother when the dead body of the horse was found, and with his brother he followed the drag or trail to where the horse died. The defendant denied that he killed the horse.

William Casey testified, for the defense, that the reputation of the defendant in the community where he lived was that of a good, hard working, industrious, law abiding man. Witness remembered no one but himself who had discussed these characteristics of the defendant, and he had done so only since the institution of this prosecution.

The motion for new trial raised the questions discussed in the opinion.

No brief for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. This prosecution, which was for the malicious killing of a horse, under provisions of Article 679 of the Penal Code, was originally commenced in a justice's court, and from thence appealed to the county court, where a second conviction was had, from which this appeal is taken. A motion was made to quash the complaint, but in our opinion it sufficiently charges the offense, and the court did not err in overruling the motion.

An application for continuance made by defendant and overruled by the court was, upon exceptions saved at the time, claimed to be erroneous, and is also assigned as error. Consid-

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ered in the light of the evidence adduced on the trial, the evidence sought from the absent witnesses was perhaps material, but no sufficient diligence to obtain the testimony is disclosed in the application.

Amongst other things, the court charged the jury that "the intent to injure the owner is the gist of this offense, but such intent may be presumed from the fact of killing." And again: "If you find that defendant killed the horse mentioned in the complaint, you may from that fact presume that such killing was done with intent to injure the owner, if from all the facts and circumstances of the case it is in your judgment proper for you to do so."

Under the law as it formerly was, the intent to injure could not be presumed from the mere fact of killing. (*Newton v. The State*, 3 Texas Ct. App., 245.) Since that decision, however, the law has been changed in that regard, and it is now expressly provided in the statute (Penal Code, Art. 679) which defines the offense that in prosecutions under this Article the intent to injure may be presumed from the perpetration of the act." This provision annexed to the statute, we think, makes it obvious that the Legislature intended to make the presumption of intention dependent upon and inferable alone from the proof of the perpetration of the act, and doubtless, also, further intended to make this offense an exception to the general rule with regard to presumptions of law from acts done, in so far as the same are permitted to be given in charge by the court to the jury. (*Jones v. The State*, 13 Texas Ct. App., 1.) We do not think the court erred in the charges we have quoted above.

As before stated, this prosecution is for "wilfully" killing the horse, and is brought under Article 679, which statute is essentially different from Article 680, under which the cases of *Davis v. The State*, 12 Texas Court of Appeals, 11, and *Thomas v. The State*, 14 Texas Court of Appeals, 200, were prosecuted. In those cases the prosecutions were for "wantonly" killing the animals alleged to have been killed.

A mature consideration of the facts in this case has, however, led us to the conclusion that the evidence does not sustain the conviction. According to our reading and understanding of it, appellant killed the horse, which was a vicious animal, because, as was stated by the witness for the State, he was compelled to do so to protect his own property. He also stated at the time that he was sorry that he had to do it. Was this a "wilful"

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killing in contemplation of law? In *Thomas v. The State*, 14 Texas Court of Appeals, 200, it is said: "When used in a penal statute, the word 'wilful' means more than it does in common parlance. It means with *evil intent*, or legal malice, or without reasonable ground for believing the act to be lawful (citing authorities). In common parlance, it is used in the sense of *intentional*, as distinguished from accidental or involuntary. To make the killing of the sheep, therefore, a *wilful* act, it must have been committed with an *evil intent*, with legal malice, and without legal justification."

We do not believe the evidence, as exhibited in the record before us, sufficiently shows such evil intent as would make the killing a wilful one in contemplation of law, wherefore the judgment is reversed and the cause remanded for a new trial.

*Reversed and remanded.*

Opinion delivered May 14, 1884.

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31 491

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[No. 2917.]

J. D. WOMACK v. THE STATE.

1. EVIDENCE—CONFESSIONS.—It is provided by the statute, Article 749 of the Code of Criminal Procedure, that "the confession of a defendant may used in evidence against him if it appear that the same was freely made, without compulsion or persuasion, under the rules hereafter prescribed." The defendant in this case being neither in confinement nor under arrest when he made the confession, none of the rules prescribed by the succeeding Article apply in this case, and the admissibility of the confession depends on the common law.
2. SAME.—In the absence of statutory provisions regulating confessions, other than such as are made when the defendant is in confinement or custody, the common law rule on the subject controls. That rule is as follows: "The confession (to be admissible in evidence) must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of threat or promise; for, however slight the threat or promise may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear, or of interest, than from a sense of guilt." The essence of the rule is that, to qualify the confession as evidence, it must

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have been voluntarily made, without the appliances of hope or fear by any other person.

2. **SAME—CASE STATED.**—The prosecuting witness was permitted, over the defendant's objections, to testify that he told the defendant that he had consulted with the prosecuting attorney, and was authorized to say to the defendant that if he would turn State's evidence and testify against his co-defendant he would not be prosecuted, and that he, the witness, in his own behalf, promised the defendant that he would make no complaint against him if he would turn State's evidence and testify. Under these circumstances the purported confession was testified to have been made to the prosecuting witness by the defendant, and the prosecuting witness was permitted, over defendant's objection, to repeat the confession to the jury. The trial judge explained that his reason for admitting the confession was that, after having made the agreement to turn State's evidence and testify, the defendant not only repudiated the agreement and refused to testify, but denied having told the prosecuting witness anything. *Held*, that the court erred in admitting the confession; that the subsequent repudiation of the confession by defendant can in no way affect the circumstances under which it was made, and the true question was whether or not the defendant was improperly induced, by hope or fear, to make the confession to the prosecuting witness. If so, no subsequent act of bad faith on the part of the defendant could render valid that which *per se* was illegal as a voluntary confession. See the opinion on the subject.
4. **THEFT—EVIDENCE—FACT CASE.**—See statement of the case for evidence, in a theft case, *held* insufficient to establish the complicity of the accused in the taking.

**APPEAL** from the District Court of Erath. Tried below before the Hon. T. L. Nugent.

The indictment in this case was joint against the appellant and one E. M. Fuller, and charged them with the theft of six hogs of the aggregate value of twenty-seven dollars, the property of John B. Henderson, in the county of Erath, Texas, on thirtieth day of September, 1881. The appellant, being alone upon trial, was convicted, and his punishment was affixed at a term of one month in the county jail and a fine of one hundred dollars.

W. H. Trent was the first witness for the State. He testified that he knew the defendant, and also E. M. Fuller, who was indicted with him in this case. He identified the defendant on trial as J. D. Womack. In the summer of 1881 witness contracted with E. M. Fuller for the purchase of four hundred head of hogs. In accordance with this contract, Fuller, on the fourth day of October, 1881, delivered to the witness a car load of hogs numbering one hundred and forty-one head. These hogs the

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witness sold and delivered to A. Wheeler, of Waco, Texas. These were the only hogs witness ever sold to Wheeler. They were delivered to Wheeler at Waco. Witness did not make the contract with the defendant. The witness did not know, and had never seen the defendant until after the hogs were delivered.

The next witness for the State was A. Wheeler. He testified that he knew the witness Trent who had just testified. He made a contract with Trent in the summer of 1881, for the purchase of hogs. In pursuance of that contract, Trent delivered to the witness a car load of one hundred and forty-one hogs, in Waco, Texas, on the fifth day of October, 1881. These were the only hogs ever delivered to the witness by Trent. Witness turned these hogs into a pen with about four hundred other hogs which he had purchased from several different parties. Witness knew J. B. and J. P. Henderson, the gentlemen who were present as witnesses in this case. Some two or three weeks after Trent delivered these hogs to witness, J. B. Henderson came to the pens of the witness in Waco, looking for hogs which he said had been stolen from him. He found four head in the witness's pen which he claimed. One was a white and black spotted sow, two were shoats, and the fourth was a black barrow with white feet. The hogs claimed by J. B. Henderson were marked with a swallowfork and underbit in each ear, and were a portion of the number delivered to witness by Trent.

The two shoats would, in the judgment of witness, have weighed about eighty pounds each, the sow would have weighed about one hundred and twenty, and the black barrow about one hundred and ten pounds. The barrow's ears looked as though they had been dog bitten and afterwards infested by worms, but the mark described was plainly discernable. In addition to this pen, the witness had what he termed his "invalid pen." Henderson did not go through the invalid pen, as witness told him he had put none of the hogs purchased of Trent in that pen. Some of the hogs purchased by witness from Trent died before the arrival of Henderson.

Within a week after the visit of J. B. Henderson to the witness's pens, J. P. Henderson, a son of J. B. Henderson, came to the pens, examined the hogs, identified and claimed the same hogs that were claimed by J. B. Henderson. J. P. Henderson found also in the invalid pen another sow in the same mark as the four described, which he claimed for his father. The two

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Hendersons claimed to know each of the hogs by their flesh marks. Witness paid Henderson fifteen dollars for the hogs, which, in the opinion of the witness, was their full value. None of the hogs were caught and examined at the time of young Henderson's visit, in the presence of the witness. The hogs were mast fed or range raised hogs, sometimes called "razor-backs."

J. B. Henderson was the next witness for the State. He testified that he knew the defendant Womack, the man Fuller, and the witness Wheeler. In September, 1881, the witness owned a bunch of forty head of hogs, running at what is known as McDow's hollow, in Erath county, Texas, from which the witness lived three miles distant. The witness last saw the hogs which the defendant is accused of stealing, about the last of August or the first of September of the year 1881. On his return home from court about the tenth of October, 1881, the witness missed eight head of hogs from his bunch. Two of the missing animals were shoats, and six were large hogs. They were all marked with a swallowfork and underbit in each ear. They were mast fed or range raised animals. One of them was a black barrow with white feet.

The witness made careful and unsuccessful search for the missing hogs through the range, and then, taking Mr. Norton with him, went to see the defendant about them. At that time the witness had no acquaintance with the defendant, and had no recollection of having seen him before. When witness and Norton rode up to defendant's house, the defendant met them at the fence. Witness told him where a bunch of his and Fuller's hogs were. Defendant replied that he was grateful for the information. Witness then asked him if he and Fuller were partners, and he said that they were. Witness asked him if he knew his, witness's, hogs. He replied that he knew the bunch of hogs on McDow's hollow, reputed to be witness's property. Witness then asked him if he knew his, witness's, mark. He said that he knew the mark that was said to be that of the witness, which was a swallowfork and underbit in each ear. Witness then asked him if he and Fuller owned or claimed any hogs in that mark. He replied that they did not; that they had owned some in that mark, but that they had run off the preceding spring, and gone back to Eastland county, whence they came; that they had heard of one of them on Armstrong creek, but of none of the others. Witness then asked him if he and Fuller, or either

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of them, had used or shipped any of his hogs. Defendant replied in the negative. Witness then asked if they had shipped or used any hogs marked with a swallowfork and underbit in each ear, and he replied that they had not.

A few days after this conversation with the defendant, the witness went to Waco and examined the hogs in A. Wheeler's pens. He found four of his hogs in Wheeler's pens. He knew the four animals both by their ear and flesh marks. One was a spotted sow, two were shoats, and the remaining one was a black barrow with white feet. The barrow's ears were injured—had been evidently bitten by dogs, and afterward infested by worms. The sow and shoats, when found by witness, were together in a part of the pen remote from that part of the pen where the barrow was found. The witness had been in the habit of seeing his hogs on the range, sometimes once, and sometimes three times a week, and, again, he would not see them for two or three weeks. Witness claimed the hogs when he found them in Wheeler's pens, and Wheeler gave him a written instrument, agreeing to hold the hogs subject to such judicial proceedings as witness might institute for their recovery. Wheeler had a second pen on his premises, which he called his "invalid pen." The witness did not examine the hogs in that pen. Witness, a few days after his return home, sent his son, J. P. Henderson, to look at the hogs in Wheeler's pen.

The witness again went to see the defendant, and found him in Dublin. He told the defendant that he wanted to have a talk with him, and suggested that each should select a friend to hear the conversation. To this proposition the defendant agreed, and selected a Mr. Carlisle. Witness selected Mr. Calvin Martin. The four parties stepped off from the public thoroughfare and sat down. Witness then said to defendant: "Mr. Womack, I am not satisfied about my hogs, and I want some further talk with you about them." The defendant replied: "All right." Witness then said: "I want you to tell these gentlemen what you told Mr. Norton and me." The defendant replied that he had forgotten what he told Norton and the witness. "Then," said the witness, "let me tell it over, and you say whether or not I tell it correctly." To this proposition the defendant agreed, and witness asked: "Didn't you tell me that you knew my hogs that run on McDow's hollow?" Defendant replied that he did, and witness asked: "Didn't you tell me that you knew my hog mark, and that it was a swallowfork and



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underbit in each ear?" Defendant admitted that he did, and witness asked: "Didn't you tell me that you and Fuller did not claim any hogs in that mark; that you had had some, but that they ran away from you, and went back to Eastland county, and that you had only heard of one old sow since, and that she was on Armstrong creek." Defendant replied that he did, and witness asked him: "Didn't you tell me that you and Fuller had not shipped any of my hogs, or any hogs in my mark?" The defendant replied that he did, and witness said: "Well, Mr. Womack, I have been to Waco and found my hogs. That won't do. Now, your neighbors tell me that you have stood well until you got into this thing with Fuller, and I believe you have been led into it. I have been to town and seen the district attorney, and he tells me that if you will come out and tell the thing just as it occurred, and be a witness for the State against Fuller, he will not prosecute you, and will dismiss the case against you, if you should be indicted." The defendant studied awhile, and replied: "I will do it."

Proceeding to repeat the defendant's confession, the witness said: "Womack then said to me: 'We got six of your hogs, and shipped them to Waco. I had been over to meet the pay train on Sunday morning, and when I returned Fuller had six of your hogs in the pen. I told him he had better be careful about handling his neighbors' hogs, and he replied that the hogs belonged to him, and that he would do as he pleased with them. We took the hogs from the pen and put them in my field. The next morning we drove them up to Mount Airy and shipped them.'"

The witness promised the defendant not to prosecute him if he would testify for the State against Fuller. After the indictment in this case was presented, the witness and the district attorney went to the defendant and asked him to state what his testimony would be. The defendant denied then that he had made any statement to the witness concerning the theft of the hogs; said that he remembered nothing he had said to witness about the matter, and refused absolutely to testify for the State against Fuller. The defense objected and excepted to the admission of the evidence of this witness about the confession.

The stolen animals belonged to the witness, and were taken in September, 1881, without the knowledge or consent of the witness. The two shoats were worth three dollars each, and the six larger hogs were worth six dollars each. Before the witness's

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conversation with the defendant in Dublin, in which he, defendant, agreed to turn State's evidence, the witness had seen the district attorney and obtained his consent to the propositions to defendant to turn State's evidence. In making the propositions, the witness acted under the directions and advice of the district attorney. Witness proposed, on his own responsibility, not to include the defendant in the complaint he intended making, if he would turn State's evidence. He, however, told the defendant that the grand jury would most probably include him in the indictment, but, in that event, the district attorney would dismiss the case as to him, if he would testify fully for the State against Fuller. After this conversation, witness went to Stephenville and filed a complaint against Fuller, but not against the defendant.

J. P. Henderson was the next witness for the State. He testified that he was the son of the witness J. B. Henderson. He remembered his father's loss of some hogs late in September, 1881. His father went to Waco in October, and a few days after his return the witness went to that city to examine some hogs in Wheeler's pens. In one pen he found one sow, two shoats, and a black barrow with white feet, which he knew by the flesh and ear marks to belong to his father. He found another of his father's sows in another pen, which Wheeler called his invalid pen. All of the five hogs bore the swallowfork and underbit mark in each ear, which was the hog mark of J. B. Henderson. Witness had often seen the hogs on the range. When the witness saw the black barrow in Wheeler's pen, one of his ears had been injured, and had been attacked by worms; so much so that the witness could not identify the mark until he caught the hog and examined it. He did not positively know whether or not Wheeler was present when he caught the hog, but thought he was. At all events one of his hands was present and helped witness catch the hog.

S. L. Norton was the next witness for the State. He testified that some time in October, 1881, Colonel Henderson asked him to go with him to see the defendant, and he did so. When they reached the fence Colonel Henderson called the defendant, who came out to the fence. Colonel Henderson introduced himself, and the defendant replied to Henderson that he knew him. The witness then gave substantially the same account of what transpired, and what was said by Henderson and defendant at the fence, as was given by Henderson, except that he did not re-

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member hearing defendant say that he and Fuller were partners. The witness had discussed the matter with Colonel Henderson as late as the day before this trial. Henderson reminded him of some parts of the conversation which he had forgotten, but which, his mind being refreshed, he remembered distinctly.

Calvin Martin was the next witness for the State. He testified that he and a Mr. Carlisle were present at a conversation between the defendant and J. B. Henderson, in the town of Dublin, some time in October, 1881. This witness repeated the conversation in detail substantially as it was related by the witness J. B. Henderson. The witness stated in conclusion that he had not talked over his testimony with Henderson. At this point the State closed.

Mr. Carlisle, the first witness for the defense, gave a different version of the conversation between Henderson and defendant in the presence of himself, the witness, and Martin. Henderson said to defendant: "I have been to Waco, and found four or five of my hogs that you and Fuller drove. Now, if you will come out and tell the truth, and help prosecute Fuller, you shall not be hurt. I have talked with Bell, the district attorney, and he says that if you will come out with the truth and help prosecute Fuller you shall not be hurt. Now, Womack, do you know my mark?" The defendant replied: "Yes, I know a mark said to be yours." Henderson then asked: "Did you and Fuller drive any hogs in that mark?" Defendant replied that he and Fuller drove five or six head in that mark. Henderson asked: "Where did you get them?" Defendant replied: "The first I saw of them they were in the pen at old uncle Daniel Fuller's. I had to go to the wood yard to meet the pay train, and when I got back to old man Fuller's the hogs were in the pen." Henderson asked: "Who penned them?" Defendant replied: "Uncle Daniel and E. M. Fuller." Henderson then asked him: "Did you not tell me the other day that you did not drive any hogs marked with a swallowfork and underbit in each ear?" Defendant replied: "I said that I did not remember driving any in that mark; that I did not have the list of marks with me. I told Fuller that he ought to be careful about driving hogs in marks given in the county; that he might get his foot into it; and that Fuller said that they were his hogs, that he had the marks recorded and would do with them as he pleased." Henderson then said: "Yes, he has my mark, and five or six others given in the county, recorded. Is that all you know about it?" De-

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fendant said: "Yes." Henderson replied: "Well, Womack, I will pledge you my word as a man, a neighbor and a Mason, that you shall not be hurt. I will go right to town and have Fuller arrested." Henderson then left, thanking witness and Martin. Witness heard every word of that conversation. Defendant did not tell Henderson that he and Fuller were partners. He said nothing about a dog catching the barrow and injuring his ears as he was driven into the pen.

Mrs. E. M. Fuller, the wife of the party jointly indicted with this defendant, testified that, in January, 1881, E. M. Fuller brought home a small bunch of hogs that included a spotted sow, a black barrow and four small shoats. Witness knew nothing about their ages. She knew nothing about marks, but knew that these animals were said to be marked with a swallowfork and underbit in each ear. The black barrow had some white feet; witness did not know how many. One of his ears was a little crimped, by a dog catching him. These hogs were quite gentle, and ran at and about Fuller's place from January until he drove them off in September, 1881. Witness had not seen them since. She frequently fed them a little corn to keep them gentle, before they were driven off. E. M. Fuller and his father, Daniel Fuller, drove these hogs to Daniel Fuller's house about the first of October, since when witness has not seen them.

Wash. Hammett testified, for the defense, that he lived on E. M. Fuller's place in the year 1881, and was at his house in January of that year. Fuller, at that time, asked witness to look at some hogs he had just brought home. Among them was a two-year-old spotted sow, a black barrow with some white feet, about eighteen months or two years old, and four spotted shoats about six months old. These six hogs were all marked with a swallowfork and underbit in each ear. Witness saw these hogs almost every day after that, until they were driven off by Fuller, about the first of October, 1881. Some time in July, or August, a dog caught the black barrow, and so injured his ear that it crimped considerable, but not enough to disfigure the mark. All of the hogs described were gentle. Witness had frequently seen Fuller and his wife feed them. Fuller claimed them and said that he bought them from William Payne, of Eastland county. Witness had not seen those hogs since Fuller drove them off in October, 1881. He had heard Fuller say that he had the defendant hired. George Johnson's testimony, for

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the defense, was, in substance, the same as that of the witness Hammett.

Mat. Tucker testified, for the defense, that Fuller penned some hogs at his, witness's, house in September, 1881. The defendant was then with him, and seemed to receive his directions from Fuller, and obey them. Fuller told the witness that defendant was hired to him.

M. E. McLaren testified that about the first of October, 1881, he went with Holcomb to the hog pens of A. Wheeler, near Waco. Holcomb had a list of marks on a piece of paper. They found four hogs in the pen which Holcomb said belonged to J. P. Henderson. Three were spotted hogs and one was a black barrow. They were small, inferior hogs, in reasonably good order.

Holcomb testified, for the defense, that he found none of the other hogs for which he was hunting in Wheeler's pens, except the four that belonged to Henderson.

Moses Hurley, Mat. Tucker, Carlyle, county surveyor Lowe, land agent Hymen, sheriff Slaughter and State's witness Calvin Martin qualified themselves, and testified that the defendant's reputation for honesty was good.

The motion for new trial denounced the verdict as contrary to the law, the evidence and the charge of the court.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

**WHITE, PRESIDING JUDGE.** Our statute provides that "the confession of a defendant may be used in evidence against him if it appear that the same was freely made, without compulsion or persuasion, under the rules hereafter prescribed." (Code Crim. Proc., Art. 749.) None of the rules prescribed by statute are applicable to the question raised by the bill of exceptions in this record, because the appellant, at the time of making the confession, was neither in confinement or under arrest. If it be admitted that our Code makes provision only for such confessions as are made when the defendant is in jail or other place of confinement, or whilst in custody of an officer (Code Crim. Proc., Art. 750), then, in the absence of a statutory rule, we would be relegated to the common law for a rule which would govern. (Code Crim. Proc., Art. 725.)

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At common law, the rule was that "the confession must be voluntary; not obtained by improper influence, nor drawn from the prisoner by means of a threat or promise; for, however slight the threat or promise may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear or interest than from a sense of guilt." (Phil. Ev., 86; *Warren v. The State*, 29 Texas, 369.) "The material inquiry, therefore," says Mr. Greenleaf, "is whether the confession has been obtained by the influence of hope or fear, applied by a third person to the mind of the prisoner. \* \* \* The rule of law, applicable in all cases, only demands that the confession shall have been voluntarily made, without the appliances of hope or fear by any other person." (1 Greenl. Ev., 13 ed., sec. 219; Whart. Crim. Ev., 8 ed., secs. 650, 651. See, also, Roscoe's Crim. Ev., 17 ed., p. 40, *et seq.*, and note.)

As shown by the bill of exceptions in this case, the purported confession of defendant was made under the following circumstances: The prosecutor, Henderson, told defendant that he, Henderson, had consulted with the district attorney, and that officer had authorized him to say to defendant that if he would turn State's evidence against his co-defendant, Fuller, he, defendant, would not be prosecuted for the theft of the hogs. Henderson also promised defendant that he, Henderson, would not file any complaint against him if defendant would appear and testify against Fuller. Under these promises, the purported confession, which the court admitted, over objection of defendant, to be given in evidence, was made to the prosecutor, Henderson. As a reason for admitting this evidence, the learned judge, in his explanation to the bill of exceptions, states, in substance, that, after the agreement with the district attorney and Henderson, the defendant repudiated the agreement, and not only refused to testify against Fuller, but also denied having told Henderson anything.

That defendant subsequently repudiated the agreement, does not, and cannot, affect the question as to the circumstances under which the confession was made. At the time it was made, was he not induced to make it through the promise or hope held out to him by Henderson? If so, then no subsequent act of bad faith on his part could or would render valid and legal that which *per se* was illegal and inadmissible as a voluntary confession. We are clearly of the opinion that the court erred in ad,

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mitting the confession over the objections of defendant, as shown by the bill of exceptions. There is no similarity, or, rather, identity, between judicial and extra judicial confessions with regard to the rule invoked by the learned judge in his explanation. Had the confession been a judicial one, or one made under such circumstances as those provided for in Article 750 of the Code of Procedure, and the defendant had subsequently repudiated his agreement to testify against his co-defendant, the fact that he had been previously cautioned that his evidence would be used against him if he failed so to testify would doubtless have rendered the confession admissible as evidence against him when tried for the offense. But, when not under arrest or in custody, or in any of the conditions pointed out in Article 750, to make the confession of a party admissible, it must have been voluntary, that is, one not induced by any promise creating hope of benefit or immunity, or any threats creating fear of punishment. (*Warren v. The State*, 29 Texas, 369.)

In addition to this error committed by the court in the admission of the confession of defendant, we are of the opinion, even taking the confession to have been properly admitted, and as part of the evidence, that the testimony is not sufficient to establish the guilty complicity of defendant in *the taking or theft* of the hogs, however much it may show his conduct and subsequent connection with the stolen property to be reprehensible in morals and law.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 17, 1884.

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[No. 2929.]

WILLIAM COULSON v. THE STATE.

1. **LIBEL—PLEADING—INDICTMENT.**—It is permissible in some cases, where the offense charged is predicated upon an instrument in writing, to set forth the substance and effect, or purpose of the instrument, without declaring upon it by its tenor or in *hac verba*, as, for instance, in perjury. But, as a general rule, whenever an instrument in writing enters into an offense as a part or basis thereof, or where its proper construction is un-

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terial, the instrument itself, *hæc verba*, should be set out in the indictment. The offense of libel is included in the latter class of cases, and an indictment for that offense, to be sufficient, must profess, upon its face, to set forth an accurate copy of the alleged libel in words and figures; otherwise, it is bad on motion to quash, or in arrest of judgment. See the opinion *in extenso* on the subject.

2. **SAME—CASE STATED.**—After alleging the writing and circulation of the instrument, the indictment avers that the said statement so made was then and there a libel etc., and, "In substance, words and figures as follows, to wit," etc. Then follows the instrument in quotation marks, and the indictment concludes as follows: "The grand jurors, upon their oath, do say that the foregoing is the language and substance and meaning of said false and malicious statement, as near as they can give," etc. *Held*, that notwithstanding the writing appears to be set out in *hæc verba*, the concluding part of the indictment, *i. e.*, "the foregoing is the language and substance and meaning of said false and malicious statement as near as they can give," etc., manifests the fact that the grand jury only attempted the substance and meaning as near as they could, and not the literal language of the alleged libel, which alone was sufficient.
3. **SAME.**—The laws of this State do not recognize, as an exception to the general rule that the libelous matter must be set forth *hæc verba*, the omission of the literal language of the libel when it is indecently obscene. If it be such as to invite the jurisdiction of the courts of this State, however obscene, it must be properly pleaded.
4. **SAME.**—The writing of a letter and the deposit of it in the post office for transmission to the party addressed constitute the publication of a libel within the meaning of the law, provided such letter be of such character that, if made public, it would affect the reputation of the party about whom it was written.
5. **SAME.**—The distinction between libel at common law and libel as defined by our statute is, that libel at common law is punishable because of its tendency to provoke a breach of the peace, while under our statute it is punishable as well because of its tendency to injure the reputation of a person. Such being the case, if this intent is averred, the indictment is sufficient, without the additional averment of the tendency and intent to provoke a breach of the peace.

APPEAL from the County Court of Collin. Tried below before the Hon. T. C. Goodner, County Judge.

The indictment attempted to charge the appellant with the offense of writing and publishing a libel against one James Jobe, in Collin county, Texas, on the fourteenth day of October, 1882.

James S. Jobe was the first witness introduced by the State. He testified that on the fourteenth day of October, 1883, James Boyd came to his, witness's, store and handed witness three dol-



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lars in money and a note, which he said the defendant had given him with the request that he deliver the same to witness. Boyd stated at the time that he did not know the contents of the note; that when the defendant handed it to him, he requested that Boyd should not under any circumstances read it, and that he had not done so. Boyd then left the store. After Boyd left, witness opened the note and started to read it, but when he saw how it commenced, he asked McDaniel, who was present, whether or not he could read. McDaniel replied that he could; and he and witness read the note together. Albert Hill was present at this time. Witness and defendant had been in business together. Witness had seen the defendant write, and thought he knew the defendant's handwriting. It was the fixed opinion of the witness that the paper exhibited was the same paper handed him by Boyd; and that the same is in the handwriting of the defendant. Witness carried the paper several months and then gave it to the county attorney. Defendant was owing the witness three dollars, and that was the amount enclosed in the note.

Cross-examined, the witness stated that no one saw or read the note after Boyd delivered it in the store until witness showed and read it to McDaniel. Witness had since shown it to several parties.

James Boyd was the next witness for the State. He testified that he knew both Jobe and the defendant. Some time during the year 1882, the defendant handed him three dollars in money with the request that he hand it to James Jobe. Witness and defendant were then in the defendant's store. In a few moments after handing witness the money defendant asked for it back, and requested witness to wait on him a minute. He then went behind his desk and remained a few minutes. When he returned he handed the witness a note, enclosing the three dollars, and requested the witness to hand the note and money to Jobe, but on no account to read the note. Witness took the note just as it was handed to him, folded over the money, walked over to Jobe's store and delivered it to Jobe. Witness did not open or read the note, nor did the defendant apprise him of its contents. Witness knew nothing of the contents of the note when he handed it to Jobe. He had never, until on this trial, seen the note since. Witness was not familiar with defendant's handwriting, and could not testify as to the identity of the note ex-

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hibited and the one he delivered to Jobe for defendant, one way or the other.

Cross-examined, the witness said that the three dollars sent by the defendant were on account of a claim made by Jobe for assisting in making a coffin for the defendant's child. The child had died a short time before, very suddenly. On its death, defendant sent for witness and requested him to see to having a coffin made. Witness started to Bryant's house to get him to make the coffin, but met Bryant in Jobe's store. He asked Bryant to make the coffin, told him that the pay would be forthcoming, and that he, witness, had some lumber and tools he could use. At this point Jobe spoke up and said that Bryant could use his shop and tools; that he had some lumber and would help Bryant make the coffin. Jobe said this as though his relations with defendant were perfectly pleasant, though they had been on bad terms for at least a year. Witness remarked to Jobe: "That is right. You are acting like a man. I am glad to hear you talk in that way, and to see you lay aside your quarrels when you find a man in distress." Jobe, at that time, said nothing about charging for what he was to do, and witness thought he was proposing merely to perform a neighborly act. Witness did not ask Jobe to assist in making the coffin, nor did he say anything to Jobe about payment for the work. The coffin was made, and Bryant made out his bill for seven dollars, which the defendant paid. Jobe afterwards made out a bill against the defendant for four dollars, which at first the defendant refused to pay. Witness had never told defendant of Jobe's connection with the construction of the coffin. When defendant refused to pay the bill, Jobe said that he would make it out of witness, as the witness had employed him. A few days later the defendant called witness into his store and asked him to see Jobe and find out the amount of his charge, which he would then pay if he had money enough. Witness saw Jobe and got him to reduce his bill by one dollar. He then returned to defendant, who sent the three dollars and the note as stated.

James Jobe, recalled, testified for the State that Boyd engaged Bryant to make the coffin as he, Boyd, passed witness's store on his way to defendant's house. Boyd had not been to defendant's house when he first spoke to Bryant about making the coffin. Bryant told Boyd that he would require assistance in making the coffin. Boyd returned in a short time and re-

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quested witness to assist Bryant in making the coffin, and said that he would see witness paid. The labor and material furnished by witness was reasonably worth three dollars. In addition, witness gave Bryant his supper, lodging and breakfast, for which he charged nothing. Witness first made out his account for four dollars.

County attorney Beverly testified that the instrument exhibited was the one handed to him by the witness Jobe, and that it had been in his possession ever since the last term of the district court, when he received it. The instrument was then read in evidence. It was as follows, a dash being here substituted for a very indecent word:

"Lake mill tex

"Oct 14 82

"Mr James Jobe

"Youre Dam niger sun of abitch iwill send the money to you  
Youre loe down black harted dam rascal Yoe haint Nothen But  
Dam ——. You hant fit to liv in White setelment God Dam  
Youre Black sun of abitch."

The motion in arrest of judgment and the motion for new trial brought in review the questions discussed in the opinion.

*K. R. Craig*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. The appeal is from a judgment of conviction for making and circulating a libel. Motions to quash and in arrest of judgment were made, in both of which the sufficiency of the indictment was called in question, "because said indictment does not set out the tenor of the instrument alleged to have been written and circulated by the defendant," and "because it appears from said indictment that the grand jury only attempted to give the substance and meaning and such portions of the language of the instrument as from their information they were able to give, and the indictment fails to assign any reason for not giving a literal copy of the instrument, or to state what the extent of the information of the grand jury was on the subject."

Omitting the formal portions, the allegations of the indict-

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ment are that defendant "did then and there unlawfully, wilfully, corruptly, maliciously, make, write and circulate a certain false, scandalous, malicious and defamatory statement in writing to, of and concerning one James Jobe, said statement then and there affecting the reputation of said Jobe, and being then and there made, written and circulated with the malicious intent on the part of said Coulson to injure said James Jobe, and the natural consequence of which was to injure said Jobe. Said statement so made as aforesaid being then and there a libel, and being, in substance, words and figures, as follows, to wit." Here the instrument is set forth in quotation marks (which we omit on account of its obscenity), after which follows this allegation: "The grand jurors aforesaid upon their oaths do say that the foregoing is the language and substance and meaning of said false and malicious statement as near as they can give," etc.

With regard to some offenses, where the offense is predicated upon an instrument in writing, it is permissible, in criminal pleading, to set forth the substance and effect, or purpose, of the instrument, without declaring upon it by its tenor or in *hæc verba*, as, for instance, in perjury (*Gabrielsky v. The State*, 13 Texas Ct. App., 436), and in swindling (*Baker v. The State* 14 Texas Ct. App., 337); but, as a general rule, whenever an instrument in writing enters into an offense as a part or basis thereof, or where its proper construction is material, the instrument itself, *hæc verba*, should be set out in the indictment. (*White v. The State*, 3 Texas Ct. App., 605.)

As was said in the case of *The State v. Townsend* (86 N. C., 675), "according to the current of authorities, beginning with the oldest and extending to the latest, and almost wholly unbroken, libel belongs to that class of cases in which it is held to be absolutely necessary to set out in the indictment the alleged libelous matter according to its tenor. (*Rex v. Burr*, 12 Mod., 218; *Wood v. Brown*, 6 Taunt., 618; 1 Russell, 252; 2 Bish. Crim. Proc., sec. 744; *The State v. Sweeney*, 10 Sergt. & R., 173; *The State v. Wright*, 1 Cush., 46; *The State v. Brownlow*, 7 Hump., 63; *Whittaker v. Freeman*, 1 Dev., 271.) The reason given for this is that the court may be able, from an exact knowledge of the contents of the publication, as seen in the record, to form its judgment thereon, and that the accused may, if he pleases, demur, and thus have the opinion of the court of a question of law

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upon the sufficiency of the matter to constitute libel, and thereby avoid submitting it as a mixed question to the jury."

In *Brownlow v. The State* (7 Humph., 62), the indictment, which was quite similar upon the point in question to the one before us, charged that the libel "contained amongst other things the following false, malicious and libelous matters and things according to the tenor and effect following, that is to say," it was held that this averment professed to set forth the substance, and not the words of the libel, and therefore not valid. "An indictment for a libel must profess on its face to set forth an accurate copy of the alleged libel in words and figures. If it does not, it will be held insufficient on demurrer or in arrest of judgment. The indictment will not be valid if it professes to set forth the libel according to its substance or effect." (See Archbold's Crim. Pl. and Prac., vol. 2, p. 1038 and note.) And in *Commonwealth v. Wright*, it was held that marks of quotation used in an indictment for libel to distinguish the libelous matter are not sufficient to indicate that the words thus designated are the very words of the alleged libel. (1 Cush., 46.)

"An indictment which charges that the libel is as follows, and then sets it forth *verbatim*, with sufficient innuendos, alleges the libel with sufficient certainty." (*Clay v. People*, 86 Ill., 147.) And in *The State v. Smith*, 7 Lea (Tenn.), 249, it was held that an indictment which charges the matter of the libel to be a letter set out in full in the indictment, "which said libel is in substance as follows, to wit," is sufficient. The court says, in distinguishing that case from Brownlow's case, *supra*: "While the words 'in substance' are used, yet it clearly and distinctly appears that they do not limit, nor were they intended to limit, the statement of the entire libelous matter complained of to anything less than the entire publication. On the contrary, the entire publication is set out."

We are clearly of opinion that the rule enunciated in the Brownlow case is the correct one in conformity with the weight of authority, and it is unnecessary for us to say whether the ruling in the Smith case is reconcilable with it or not upon the ground stated, viz., that the word "substance" does not characterize the allegation where the writing is set out *verbatim*. (2 Archbold's Crim. Pl. and Prac., 8 ed., top p. 1033, and note.)

In the case before us the writing appears to have been set out *hæc verba*, but the following averment, that "the foregoing is the language and substance of and meaning of said false and

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malicious statements as near as they (the grand jurors) can give," manifests the fact that, to say the least of it, the grand jury have attempted the substance and meaning as near as they could, and are not certain that they have done so, much less that they have given the language literally.

The only exception to the rule that the libelous matter must be set forth *hæc verba* is where the obscenity of the language would excuse its reproduction in the pleadings. And with regard to this exception Mr. Bishop says: "The avoiding of obscene allegations in the record, breeding corruption, is deemed an adequate necessity to excuse the setting out the words of an obscene libel. The indictment should give such a description of them as decency permits; then if it states the reason for omitting to recite them it will be sufficient." (1 Bish. Crim. Proc., 3 ed., secs. 496, 497.)

We do not believe the reason stated for the exception a good one. If the matter is one necessary to be determined by the courts under the law, then the law which requires that it be brought before its tribunals recognizes no authority of modesty or sentimentality to interfere with the fixed rules it has prescribed for the proper prosecution of offenders. We are of opinion, for the reasons given, that the indictment in this case was insufficient, and that the motions to quash, and in arrest of judgment, were well taken and should have been sustained.

There is another matter growing out of this record, and affecting the sufficiency of the indictment, on the motion in arrest, which it may be well to notice. It is made to appear that the libelous instrument is a private letter written to the prosecutor, Jobe, by appellant, and not shown by appellant to any one, and not intended by him to be seen by any one but Jobe.

In *Smith v. The State*, 32 Texas, 594, it is held that "the writing of a letter and the deposit of it in a postoffice for transmission to the party addressed constitute a publication of it within the law of libel." Mr. Bishop says: "One publishes a libel who sends it to a single individual." (2 Bish. Crim. Proc., 3 ed., sec. 800.) And this, we are of the opinion, is the law with us, provided the private letter or instrument be of such character as that, if made public, it would affect the reputation of the party about whom it was written. The question here is as to the sufficiency of this indictment to charge libel, based upon a private letter sent to a private individual.

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There is a distinction between libel at common law and libel under our penal code. At common law libel was punishable solely on account of its tendency to provoke a breach of the peace (1 Bish. Crim. Law, 7 ed., sec. 591), and, where common law prevails, "the State takes notice of a libel against a *private individual*, where the language is mere defamation of himself only, because it tends to a breach of the peace. \* \* \* If the libel is contained in a *letter* sent to the person libeled only, an averment (in the indictment) is necessary, because the law does not presume that the same temptation to violence will follow as in the case of public abuse, and it therefore requires the tendency and intent to be proved, and, to be made the subject of proof, they may first be averred." (*The State v. Henick*, 3 Crim. Law Mag., 174; *Rex v. Topham*, 4 Term R., 128.) Under our Penal Code, libel is punished on account of its tendency to injure the reputation of a person (Penal Code, Arts. 616 to 644, inclusive), and such being the case, if this intent is averred, the indictment is sufficient without the additional averment of the tendency and intent to create a breach of the peace.

Because the court erred in overruling the motions to quash the indictment and arrest the judgment, and because the indictment is insufficient, the judgment is reversed and the cause dismissed

*Reversed and dismissed.*

Opinion delivered May 14, 1884.

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[No. 3108.]

J. H. BROWN v. THE STATE.

1. **TRANSCRIPT.**—STATEMENT OF FACTS shown by the transcript to have been filed after the adjournment of the trial term of the court will not be considered for any purpose, unless the transcript also brings up an order of court authorizing it to be filed after the adjournment.
2. **PRACTICE IN THE COURT OF APPEALS.**—In the absence of a statement of facts, this court will inquire no further than to ascertain whether or not the indictment was sufficient to charge the offense and sustain the charge of the court and the verdict of the jury, except as to matters so presented by bills of exception as to be determinable without a statement of facts, or where it appears that the conviction was not had by due course of law.

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3. **SAME—CHARGE OF THE COURT.**—The rule stated does not preclude this court from revising the charge of the court, in a felony case, when such charge is not warranted by the indictment, and when, under any state of evidence, it would be manifestly erroneous, and may have prejudiced the rights of the accused.
4. **SAME—ASSAULT TO MURDER.**—INDICTMENT charges the appellant in this case with an assault with intent to murder one A. The charge of the court authorized the jury to convict in case they believed from the evidence that he committed such assault upon either A. or M. *Held*, error, because under no state of proof could the jury be authorized to convict for an assault on M. under an indictment charging the assault to have been committed upon A.

APPEAL from the District Court of Young. Tried below before the Hon. B. F. Williams.

The indictment charged the appellant with an assault with intent to murder one S. B. Allison, in Young county, Texas, on the thirteenth day of February, 1883. The trial resulted in the conviction of the appellant, and his punishment was affixed at a fine of five hundred dollars and three months' imprisonment in the county jail.

The difficulty in which this prosecution had its origin is the same in which John Rogers was killed, for which S. B. Allison was prosecuted to conviction of murder in the second degree. Allison's case will be found reported in full on page 402 of volume 14 of these Reports. A purported statement of facts, covering ninety pages of foolscap, is brought up with the transcript in this case, but is not recognized by this court, for the reason assigned in the first head note. It is, however, a substantial repetition of the narrative of the occurrences at the time of the difficulty, as condensed in the report of Allison's case.

*O. E. Finlay and C. W. Finlay*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** 1. It appears from the transcript in this case that the term of the court at which the conviction was had ended on the eighth day of November, 1883. We find in the record a paper purporting to be a statement of facts, filed November 17, 1883, but we find no order of the court authorizing a statement of facts to be prepared and filed in the record after the adjournment of the court for the term. This being the



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state of the record, there is no such statement of facts as this court can recognize and consider. (*Durley v. The State*, 11 Texas Ct. App., 172; *Gerrold v. The State*, 13 Texas Ct. App., 345.)

2. Where there is no statement of facts in the record, this court will inquire no further than to ascertain whether the conviction has been had upon a good indictment, and one which sustains the charge of the court and the verdict of the jury, and except as to matters so presented by bills of exception as to be determinable without a statement of the facts of the case, or where it appears that the conviction has not been by due course of law. (*Kaskie v. The State*, 7 Texas Ct. App., 202; *Hemanus v. The State*, Id., 372; *Castanedo v. The State*, Id., 582; *Ferrell v. The State*, 2 Texas Ct. App., 399.) But this court will revise the charge of the court in a felony case when such charge is not warranted by the indictment, and when, under any state of evidence, it would be manifestly erroneous, and may have prejudiced the rights of the accused. (*Mitchell v. The State*, 2 Texas Ct. App., 404.)

3. In the case before us the indictment, which is a valid one, charges the defendant with committing an assault upon one S. B. Allison, with intent to murder the said Allison. Upon this indictment the defendant was convicted of an aggravated assault. We have very carefully considered the charge of the court, and, as we understand it, we do not think that it is in conformity with the indictment in one essential particular.

Without copying the portion of the charge which in our opinion is erroneous, we will merely state that, as we construe it, it instructs the jury that if the defendant committed the assault either upon the said S. B. Allison or upon one Munnerlyn he would be guilty as charged in the indictment. If the construction which we place upon this charge is correct, then it was manifestly erroneous, and may have prejudiced the rights of the accused. As the defendant was charged with an assault upon Allison, under no state of the evidence could he be legally convicted, under that indictment, of an assault upon Munnerlyn, or any other person. This charge was excepted to by the defendant at the trial, and is properly called to the attention of this court by a bill of exceptions. We do not think we have misconstrued the charge. We think a jury would be likely to understand it as we do, that is, that it warrants the conviction of the defendant if he committed the assault upon either Allison

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or Munnerlyn. If it does not mean this, then we must confess its meaning is to our minds so obscure and uncertain as to render it as objectionable as if it did.

There are no other questions presented in this case which, in the absence of a statement of facts, we can determine.

Because of the error we have mentioned in the charge of the court, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered May 17, 1884.

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[No. 2883.]**HERMAN WELLER v. THE STATE.**

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33 297
1. **CONSTRUCTION OF STATUTES—STATUTORY REPEAL—JURISDICTION—CASE STATED.**—By the act of January 22, 1875, Crockett county was created out of a portion of Bexar county. By the act of February 10, 1875, it was attached to Kinney county for judicial purposes. No further legislation was had concerning Crockett county until the adoption of the Revised Statutes, when it was embraced in the twentieth judicial district, but was not attached to any county for judicial purposes. By the act of April 28, 1882, it was again attached to Kinney county for judicial purposes, and again so attached by the act of April 9, 1883. It appears never to have been attached, for judicial purposes, to any county other than Kinney, and never to have been organized. Section 3 of the final title of the Revised Statutes provides as follows: "All civil statutes of a general nature, in force when the Revised Statutes take effect, and which are not included herein, or which are not hereby expressly continued in force, are hereby repealed." *Held*, that the effect of the section quoted was to repeal the act of February 10, 1875, which was a statute of a general nature. *Held*, further, that in divesting Kinney county of jurisdiction over Crockett county, the effect of the repealing statute was to restore the jurisdiction of Bexar county, where it remained until the passage of the act of April 28, 1882, when it was again conferred upon Kinney.
  2. **SAME.—INDICTMENT** was presented in the district court of Kinney county September 19, 1882, when Kinney county had jurisdiction over Crockett county, but it charged that the offense was committed in Crockett county on March 30, 1882, at which time Crockett county was under the jurisdiction of Bexar county. It does not appear, however, that Bexar county ever exercised or attempted to exercise jurisdiction over the case. Under the well settled rule that when the place where an offense is committed,

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is, after the commission of the offense, created into a new county, such new county has jurisdiction over the offense, it is *held* that Crockett county, having been attached to Kinney county for judicial purposes, the indictment, laying the venue of the offense in the unorganized county of Crockett, was properly presented in Kinney county, which county had jurisdiction to try and determine the case. See the opinion *in extenso* on the question, and note the opinion also for exceptions to the indictment properly overruled.

3. EVIDENCE—CONFESSIONS.—It is a common law rule that the confession of a defendant, induced by promises or threats that might have influenced his mind, is not admissible in evidence against him, under any circumstances. To this rule, however, we have a statutory exception, which qualifies such confession as evidence if, in connection with it, the accused makes a statement of facts or circumstances which are found to be true, and which conduce to establish his guilt of the offense charged. In this case the accused, without being warned, and in view of promises of the arresting officers of protection from mob violence, and of assistance to effect his escape, confessed that he killed the deceased, that his motive was robbery, that he killed him with a pistol and rocks, at a certain place, and dragged his body to a certain bluff and threw it in the Rio Grande, and that he secreted the money in a certain crevice. He pointed out the place of the murder where two bloody rocks were found, and whence a heavy body had evidently been dragged to a bluff overlooking the river, and also a crevice in which the money was found. *Held*, that the extraneous statements of the accused having been found to be true, his confession comes properly within the exception to the general rule, and was properly admitted. See the opinion *in extenso* on the question.
4. SAME.—The decision in Walker's case (2 Texas Ct. App., 326), correctly states the rule of construction of the statute regulating the admission of confessions, as follows: "In this State, when a prisoner makes a statement of facts, and in consequence of such information the property stolen, the bloody clothes of the deceased, or the instrument with which he says the offense was committed, or any other material fact, is discovered, such statement, together with the confession of the crime itself, is proper testimony to go before the jury."
5. SAME—CASES OVERRULED.—Insofar as they hold that only such statements as are afterwards found to be true are admissible, excluding the remaining parts of the confession, the following cases are hereby overruled: *Davis v. The State*, 8 Texas Court of Appeals, 510; *Walker v. The State*, 9 Texas Court of Appeals, 38; *Massey v. The State*, 10 Texas Court of Appeals, 645; *Kennon v. The State*, 11 Texas Court of Appeals, 356.

APPEAL from the District Court of Kinney. Tried below before the Hon. T. M. Paschal.

The indictment in this case, presented in the district court of Kinney county, Texas, on the nineteenth day of September,

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1882, charged the appellant with the murder of one Alexander Backus, in Crockett county, an unorganized county attached to said Kinney county for judicial purposes, on the thirtieth day of March, 1882, by shooting him with a pistol. The trial of the appellant resulted in his conviction of murder in the first degree, and his punishment was fixed at a life term in the penitentiary.

C. Soap was the first witness sworn for the State. He testified that he knew Alexander Backus in his lifetime. On or about the last day of March, 1882, the witness saw the dead body of the said Backus, in Crockett county, Texas. On the morning of that day the witness was working on the Mexican side of the Rio Grande. About nine or ten o'clock on that morning he noticed what he took to be the body of a man hanging over the bluff of the river on the Texas side. Witness observed this object hanging over the bluff pretty much the entire day, and in the evening he saw a number of persons, who had congregated on the bank, draw it up. At that time the witness did not know whose body it was. Shortly after this the witness crossed to the Texas side and saw the body of Alexander Backus lying on the bluff over which witness had that day seen the object described hanging. Witness did not touch the body, but walked around it and saw that two pistol shots had been fired into the head, one entering at the back and one at the side.

The witness identified the defendant on the trial as Herman Weller. The witness saw the defendant on the day preceding the day he saw the body suspended over the bluff. The defendant was then walking around under and over the bluffs, and evidently examining them. Witness, who at that time was on the Texas side of the river, asked him what he was doing. He replied that he was just looking around. The witness again saw the defendant walking around under the bluff on the day after the deceased was killed. The body of Backus, after it was raised from the bluff, was taken on some boards and stretched on two beer barrels at a neighboring saloon. The defendant, who was then present, walked up near to the body, examined it, and said: "I don't know who it is." Some one of the campers present identified the body as that of Alexander Backus, and defendant, walking to the outside crowd, remarked: "Yes, that is Alex. What will be done about it?"

Cross-examined, the witness stated that the place where the body was found was near the camp of a party of railroad men engaged in the construction of the Sunset railroad. The camp

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was composed of a large number of men. Wagons and teams were constantly passing over the wagon roads between the camp and the works. Other men were under the bluffs when the witness saw the defendant there, including witness and two or three others, who were fishing. The defendant had as much right at that place at that time as any of the party. The Rio Grande, at the bluff where the body was found hanging, was about three hundred feet wide. When he discovered the body, the witness was at work, chopping wood, on the Mexican side, about one hundred yards from the river. Witness took the object hanging over the bluff to be the body of a man when he first discovered it, and when he crossed back to the Texas side that evening, he found it to be the dead body of Alexander Backus.

M. C. Slater was the next witness sworn for the State. He testified that he knew Alexander Backus in his life time. Backus was killed in Crockett county, Texas, on the thirtieth day of March, 1882. About dark, on the night of that day, the defendant and the deceased entered the saloon kept by the witness at the railroad camp. The defendant invited Backus to take a drink. Backus refused, with the remark: "You know that I never drink, and what is the use of your asking me?" The defendant then took a drink of whisky alone, and he and the deceased left the saloon together. Within the next half hour the witness heard two reports of a pistol from the direction in which defendant and deceased had gone. The reports sounded like the shots were fired from a small pistol, and, as near as the witness could locate them by sound, they proceeded from a point near where the witness, on the next day, found the dead body of the deceased. About two hours later, the defendant returned to the witness's saloon, alone, pretending to be very drunk. Witness did not know whether or not he was actually drunk, but he did not appear so to witness. He had only taken one drink at witness's saloon. The witness knew that the defendant had a small pistol, of about thirty-six or thirty-eight calibre. The defendant had that pistol out on witness's counter that day, trying to fit cartridges to it. It then contained but three loads.

On the evening of March 31, the evening succeeding the events narrated, the witness and Charles McDonald went to the bluff, within less than a half a mile of the witness's saloon, and found the body of a man hanging over it. McDonald and others held

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the witness while he reached down, caught the body and hauled it up on the bluff. Examination disclosed that the body was that of Alexander Backus, and that two shots from a small pistol of about thirty-eight calibre had penetrated the head. One ball entered the back of the head, powder burning it. The other entered at the side of the head. The face was much disfigured, and so covered with blood that the body was not at first recognized by any of the party present. The body was then taken to the witness's saloon on the lid of a coffin prepared to receive it, and was stretched on two beer barrels. The defendant came up to the body, and was asked, either by witness or McDonald, if he knew whose body it was. He replied that he did not. Shortly afterward, a young man came up from Mahoney's camp and said: "I know the body. It is that of Alexander Backus," and, pointing to the defendant, "there is a man who ought to know him, for he has been bunking with him for six months." The defendant's face turned instantly deathly pale, and he trembled to such an extent that he could not speak for a minute or two. When he recovered sufficiently, he said, with much agitation, that the face was so bloody he could not recognize the body. The body was buried that evening, and the witness saw no more of the defendant until next morning, when he came to witness's saloon with a bundle in his hand, and said that he was going away. He hung around witness's saloon for a short time, left his bundle there, and went over to another saloon near by.

On this last visit of the defendant to the witness's saloon, the witness noticed that one of his fingers, at its intersection with the nail, had been bitten nearly through. The print of two teeth on both sides were plainly discernable. The defendant first told the witness that, while at work drilling, he placed his finger on top of the drill and another man struck and mashed it with a hammer. Thirty minutes later, he told witness that a rock fell on his finger and mashed it while he was climbing a bluff. Later in the evening, he told the witness his finger was hurt by a scraper turning over and mashing it against a chain. On the next day, he told the witness that, on the night he was so drunk at witness's saloon, he fell down a bluff and mashed his finger on some rocks. When the defendant came to witness's saloon with the bundle, witness noticed that his, defendant's, pants and his clothing on one side were very bloody. The defendant was arrested by Mr. A. M. Gildea, deputy sheriff of Tom Green county.

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The witness assisted Mr. Gildea as a guard after the arrest of defendant, and during the time that he had the defendant in custody he had a conversation with him, defendant. Gildea was present during a part of this conversation. The defendant, after his arrest, was held in the witness's saloon. Part of the time Gildea and witness were both with the defendant, and at other times only one or the other. A number of armed men congregated around the saloon after dark. Gildea and witness promised the defendant that they would protect him from mob violence if it should be attempted. Gildea and witness took the defendant off into the brush and prickly pear as soon as they could, and had a conversation with him. They told him that they knew that he killed Backus, and that the best thing he could do was to confess the whole thing to them, and tell them what he had done with the money, and promising, if he did so, to furnish him a horse and show him a crossing over the Rio Grande. At first, the defendant denied that he had any knowledge of the killing, but presently asked: "How much do you fellows want, anyhow?" Witness replied: "You ought to have got at least two hundred and fifty or three hundred dollars." Gildea said: "We want all you have got." Defendant said: "If you will do that (get him a horse and show him a crossing) it will be about one hundred and fifty dollars apiece in your pockets." Gildea said that he would go off and see about a saddle. Witness then asked defendant why he had killed Backus, and he replied: "I killed him for his money."

When Gildea came back, he took the defendant and went down toward the river, telling witness to get the horse and bring him on, and whistle when a certain point was reached. Witness did not get a horse, but waited a while, and then went to the place indicated and whistled. Gildea and defendant joined the witness, and defendant said: "Come on; I will show you where the money is hid." He then led witness and Gildea to a place where a water road had been blasted out of the rock, and, pointing up the bluff, said: "It is there." Defendant, witness and Gildea climbed up, and Gildea told defendant to point out where the money was hidden. The defendant, pointing, said: "There between those two rocks." Witness inserted his hand into a crevice made by a blast, over which a rock had been placed, and found the money. Gildea and witness took the money and placed the shackles back on the defendant's hands. The money found amounted to two hundred and eighty dollars.

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ten of which the defendant said belonged to him, and the balance to Backus.

The defendant told the witness that he shot and killed Backus; that Backus fell at the first shot, and that he then shot him again; that he then struck him with two rocks, once in the mouth and once on the side of the head; that he then dragged the body to the bluff, rifled the pockets of the money, and threw the body over the bluff. After witness and Gildea had secured the money and reshackled the defendant, he said that he would not go back, and told witness and Gildea to shoot him, closing with the remark: "You fellows think you have played a d—d smart trick." Next day the witness went to the point where the defendant said he killed the deceased, and there found a plain trail, showing where some heavy body had been dragged along. There was blood on the stones and grass, and two rocks, one of them bloody. Everything was found just as described by the defendant.

Cross-examined, the witness stated that, in the conversation with witness and Gildea, the defendant said that he and Backus went to Gulet's camp to buy a pair of shoes; that, on their return, he told Backus that he, Backus, owed him fifty cents; that Backus told him that he was a d—d liar; that he then struck the deceased, and the deceased threw a rock at him; that they then clinched, and in the struggle he shot the deceased, and the deceased fell, when he shot him again; that, finding he had killed the deceased, and wanting no one to know it, he dragged the body to the bluff and threw it over; that he knew the deceased had money, and, thinking he might as well have it, he took it before throwing the body over. He did not tell the witness that he lost his pistol in the struggle, and, in looking for it, found the money on the ground over which he had dragged the body. The defendant was under arrest when he made the statements detailed, and had been promised protection from the mob, a horse, and information as to a crossing over the river.

On re-direct examination, the witness stated that it was about one o'clock at night when the defendant disclosed the place where the money was hidden. Gildea had, professedly, gone to see about getting a saddle when defendant told witness that he killed deceased for his money. Defendant and deceased were young men of about the same age.

A. M. Gildea was the next witness sworn for the State. He testified that he arrested the defendant in Crockett county,



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Texas, on the first day of April, 1882. When witness told the defendant he was a prisoner, the defendant asked why he was arrested. Witness told him on suspicion of having murdered Backus. The defendant, at that time, had one of his fingers wrapped in rags. Witness made him unwrap it, and saw that it had been badly bitten. Witness then took him over to Slater's saloon, and witness and Slater concocted a scheme to extort a confession. They told the defendant that if he would tell about it, and show where he had secreted the money he took from the deceased, they would protect him from mob violence. The defendant at first refused the proposition, but, later, said that he would do so if witness and Slater would provide him with a horse, saddle and bridle, and show him a crossing over the Rio Grande. To this proposition witness and Slater agreed. Defendant then asked how much of the money witness and Slater wanted. Witness told him that they must have it all. Thereupon defendant refused to treat. About this time, a crowd of armed men began to collect around the saloon, and witness and Slater took the defendant to a brushy hollow near the saloon, and repeated their proposition. The defendant again asked how much of the money must be forthcoming, and witness told him again that all must be turned over. Defendant then said that he would not show where the money was hidden until he saw the horse, saddle and bridle, and had been shown the crossing. The witness then left him in charge of Slater, on the pretense of seeing about the saddle.

After a time, the witness returned and told defendant and Slater that he would take defendant to the river, while Slater would take a certain horse to that point. Slater left, as if to go for the horse. On their way to the river, the defendant stopped and said: "Let me get a heavy shirt I have here." He then stepped aside, to a small clump of bushes, stooped down and took up a shirt, which he threw over his arm. Witness and defendant went on to the "bottom." While waiting for Slater, witness struck a match, to light a cigarette, and, from the light of the match, noticed that the shirt had blood on it. Witness asked him where the blood came from. He said that some of it came from Backus's body, and some from his finger, which bled freely. When Slater whistled, witness and defendant went to where he was, and from there, under the guidance of the defendant, went to where the money was hidden. Defendant pointed to a crevice in the rock, and said: "There is the place."

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Witness told him to point it out. He pointed down to the crevice, and said: "There; right there." Slater displaced a rock and found the money. Witness put the money in his handkerchief, and then in his pocket. The witness then turned to put the shackles on defendant. Defendant made a spring toward the bluff, but witness caught him. Defendant then began to cry; said that he would not go back to the saloon, and told witness to kill him. Witness replied that he was an officer, performing his duty, and could not kill him. Defendant then said: "You fellows think you have played a h—ll of a smart trick," and returned with the witness. During the conversation with witness and Slater, the defendant said that he killed Alexander Backus, dragged his body to the bluff, took the money out of Backus's pocket, and threw the body over the bluff. When this arrest was made, the witness was deputy sheriff of Tom Green county. He removed the defendant from Slater's saloon because he thought that a body of armed men were gathering to hang him.

Cross-examined, the witness stated that the murder was committed on Thursday evening, and that the defendant had ample time to make good his escape before his arrest on Saturday evening. The confession of the defendant as detailed was the result of an inducement held out to him by the witness—the same as stated on the examination in chief. Defendant made the statement concerning the killing, detailed by the witness Slater on cross-examination, in the hearing of the witness. The money described was recovered by means of the information furnished by the defendant.

The motion for new trial presented the questions discussed in the opinion.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** It is alleged in the indictment and the proof shows that the homicide of which defendant stands convicted was committed in Crockett county, about the thirtieth day of March, 1882. This conviction was had upon an indictment presented by the grand jury of Kinney county, and the trial took place in said Kinney county, the indictment alleging that Crockett county, the venue of the offense, was attached for

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judicial purposes to said Kinney county. Defendant excepted to the indictment upon the following grounds:

1. Because it did not appear to be the act of the grand jury of the proper county.

2. Because at the time of the alleged offense Crockett county was attached for judicial purposes to Tom Green county, and that the grand jury of Kinney county had no jurisdiction over the offense.

3. Because the indictment does not show the venue of the offense to be within the jurisdiction of the district court of Kinney county.

4. Because it does not appear that the grand jury who presented the indictment were impaneled to inquire into and of offenses in said county; and

5. Because it does not appear from said indictment that said Crockett county is not duly organized.

These exceptions were overruled by the court, and this ruling is assigned as error.

1. By act of twenty-second of January, 1875, Crockett county was created out of a portion of the territory of Bexar county. (Acts Fourteenth Legislature, second session, p. 2.) By act of February 10, 1875, it was attached to the county of Kinney for judicial purposes. There was no further legislation in regard to Crockett county until the adoption of the Revised Statutes. In apportioning the counties into judicial districts, Crockett county, by the Revised Statutes, is placed in the twentieth district, but it is not attached for judicial purposes to any county. (Rev. Stat., Art. 17, subdiv. 20.) It was placed in the seventy-fifth representative district (Rev. Stat., Art. 13, subdiv. 75), and in the thirtieth senatorial district (Rev. Stat., Art. 11, subdiv. 30), but was not placed in any congressional district. (Rev. Stat., Art. 16.) By act of April 28, 1882, it was again attached for judicial purposes to Kinney county (Acts Seventeenth Legislature, special session, p. 5), and it was again so attached by act of April 9, 1883. (Acts Eighteenth Legislature, p. 65, sec. 38.) It does not appear to have ever been attached for judicial purposes to any county except Kinney, nor does it appear to have been organized at any time, but on the contrary is treated by the act of April 9, 1883, above referred to, as an unorganized county at that date.

Did the Revised Statutes repeal the act of February 10, 1875, attaching Crockett to Kinney county for judicial purposes? We

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think so. Section 3 of the final title of the Revised Statutes provides "that all civil statutes of a general nature in force when the Revised Statutes take effect, and which are not included herein, or which are not hereby expressly continued in force, are hereby repealed." The act of February 10, 1875, above referred to, was a civil statute of a general nature, and therefore repealed. (*Cox v. The State*, 8 Texas Ct. App., 254.) This being the case, Crockett county was no longer attached to Kinney county for judicial purposes.

What county, then, had jurisdiction over it for judicial purposes? In our opinion Bexar county, the county from whose territory it was created, resumed jurisdiction over it for judicial purposes. (*Runge v. Wyatt*, 25 Texas Supp., 291; *Clark v. Goss*, 12 Texas, 395; *O'Shea v. Twohig*, 9 Texas, 336; *Nelson v. The State*, 1 Texas Ct. App., 41.) This jurisdiction remained with the mother county, Bexar, until April 28, 1882, when it was again detached and given to Kinney county, by the act of the Legislature of that date. (Acts Seventeenth Legislature, special session, p. 5.) On the nineteenth day of September, 1882, the indictment in this case was presented and filed in the district court of Kinney county. At that date said district court had jurisdiction over the county of Crockett, but did not have such jurisdiction on the thirtieth day of March, 1882, the date of the commission of the homicide. At that date Bexar county had jurisdiction over said Crockett county.

But, it not appearing that Bexar county ever exercised or attempted to exercise its jurisdiction over this case, did not the jurisdiction of Kinney county attach to the case when Crockett county was attached to it for judicial purposes by the act of April 28, 1882? We think so. It is well settled that when the place where an offense is committed is, after the commission of the offense, created into a new county, such new county has jurisdiction over the offense. (*Republic v. Smith*, Dallam, 407; *Nelson v. The State*, 1 Texas Ct. App., 41.) We think this rule is applicable to the case before us. Crockett county, had it been organized, would of course have had jurisdiction over this offense, but until it was organized that jurisdiction was vested in Kinney county, but the jurisdiction was nevertheless that of Crockett county, transferred for the time being to Kinney county for the purposes of justice and the due enforcement of the laws.

We hold, therefore, that the district court of Kinney county

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did not err in entertaining jurisdiction of this case, and that none of the defendant's exceptions to the indictment are well taken.

2. Upon the trial, the confession of the defendant that he had committed the murder was admitted in evidence over his objections, and this ruling of the court was objected to, and is properly presented in the record by bill of exceptions. At the time of making the confession the defendant was in the custody of an officer, having been arrested by said officer for said murder. He was told by the officer and another person who was assisting the officer as a guard, that they knew that he, defendant, had killed the deceased, and that the best thing he could do was to tell them the whole thing, and tell them what he had done with deceased's money; that if he would do this they would protect him from being mobbed, and would furnish him with a horse, and show him a crossing on the Rio Grande into Mexico. Thereupon the defendant confessed he had killed the deceased for his money, and he detailed the manner of the killing; stating that he shot him in the head with a pistol, and hit him on the head with rocks, and then dragged the dead body to a bluff on the river bank and threw it over the bluff; that he killed deceased to get his money, and told where the money was concealed in a crevice among the rocks, and pointed out the place. The money was found at the place pointed out by him, and it was also found upon examination of the ground where he said the murder was perpetrated that a body had apparently been dragged from there to the edge of the bluff, beneath which the dead body of deceased had previously been found. On the ground where defendant stated he killed deceased was also found two rocks with blood upon them. All these statements were made while the defendant was under arrest, and without his being cautioned that they would be used in evidence against him, and upon the promise that he would be protected from the mob and would be assisted across the Rio Grande into Mexico, and these assurances and promises were made to him by the officer having him in custody.

Were the confessions of the defendant, made under the circumstances stated, admissible in evidence against him? At common law, as we understand the authorities, a confession induced by promises or threats, of a character and under circumstances such as might have influenced the mind of the prisoner in making the confession, would not be evidence against him

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under any circumstances. (1 Greenl. Ev., secs. 219-231, 232; Whart. Crim. Ev., secs. 650, 651, 678.) But, while this is the general rule prescribed by the provisions of our statute relating to confessions, we think that statute makes an exception not recognized fully by the common law. Where, in connection with the confession, the prisoner makes a statement of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or instrument with which he states the offense was committed, then, in our opinion, his entire confession, as well as his statements as to such extraneous facts, are admissible evidence against him.

There is some confusion and conflict in the decisions of our courts upon this point. In *Warren v. The State*, 29 Texas, 370, the defendant was induced by fear that his life would be taken to make a confession, in connection with which he made statements conducive of his guilt, and which were found to be true. He also at the same time made other statements which had no bearing upon the issue of his guilt. His confession and the accompanying statements were admitted in evidence, and the court charged that "if some of the facts confessed were found to be true by other evidence, the jury may consider them all true." This charge was held error because it did not confine the jury to the consideration of those facts and circumstances found to be true, which conduced to establish the guilt of the defendant, but permitted them to consider other facts in evidence which did not conduce to establish his guilt; and for this error in the charge the conviction was set aside. Judge Donley, in delivering the opinion of the court, after stating the common law rule which rejects a confession when made under the influence of a threat or promise, says that our statute regulates the subject now, and he recognizes the exception to the general rule which we have hereinbefore stated, and holds, as we understand the opinion, that not only the statements of the prisoner which were in corroboration of his confession and conducive to establish his guilt were evidence against him, but that his entire confession of guilt was also evidence, although extorted by fear. *Selvidge v. The State*, 30 Texas, 60, in which the opinion was delivered by the same learned judge, supports, we think, the view expressed in the Warren case.

In *Strait v. The State*, 43 Texas, 486, the same question occurred, but was not decided, as a disposition of the case was

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made upon other grounds. Chief Justice Roberts, in delivering the opinion in Strait's case, cites the Warren and Selvidge cases and says: "We understand these cases merely as holding that it is admissible to show not only the fact that the stolen property had been traced by means of information received from the prisoner, but also the information or disclosure itself."

In *Walker v. The State*, 2 Texas Court of Appeals, 326, Presiding Judge Ector, in delivering the opinion of the court, plainly and emphatically states the difference between the rule at common law and the rule as prescribed by our statute. After stating the rule at common law, he says: "In this State, when a prisoner makes a statement of facts, and, in consequence of such information, the property stolen, the bloody clothes of the deceased, or the instrument with which he says the offense was committed, or any other material fact is *discovered*, such statement, *together with the confession of the crime itself*, is proper testimony to go to the jury." In *Davis v. The State*, 2 Texas Court of Appeals, 588, after quoting the common law rules relating to confessions, it is said: "These common law rules have been modified by our Code in some important respects," and, as one of the modifications, the one we are discussing is named.

In *Davis v. The State*, 8 Texas Court of Appeals, 510, the rule, as stated in the previous decisions above cited, seems to be restricted, or, rather, not recognized, and the common law rule, as stated by Mr. Greenleaf (1 Greenl. Ev., sec. 231), is quoted and approved. This rule, as we have before seen, while it admits in evidence the statements of the prisoner as to extraneous material facts found to be true, excludes the confession of guilt, unless it is otherwise admissible. In *Walker v. The State*, 9 Texas Court of Appeals, 38, it is said: "When a confession is made by a prisoner in custody, without his having been first cautioned that it may be used against him, and, in connection with such confession, he states facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, his statement of the facts or circumstances which are found to be true is competent evidence, *but not the entire confession*. This is the settled construction of our statute regulating the admissibility of confessions." The cases referred to as thus settling the construction of the statute are as follows: *Davis v. The State*, 8 Texas Court of Appeals, 510; *Strait v. The State*, 43 Texas, 486; *Selvidge v. The State*, 30

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Texas, 59, and *Warren v. The State*, 29 Texas, 370, all of which we have hereinbefore referred to.

Upon a careful examination, we do not think the rule as stated in the *Walker* case, last quoted from, is supported by any of the decisions cited except the *Davis* case. It is also to be noted that *Walker's* case, in 2 Texas Court of Appeals, and *Davis's* case, in 2 Texas Court of Appeals, *supra*, which hold a contrary doctrine, are not referred to. In *O'Connel v. The State*, 10 Texas Court of Appeals, 567, it is said that "the rule will not admit the entire confession, but is limited solely and strictly to the facts and circumstances found to be true. To go beyond, and admit the entire confession, would be contrary to the settled construction of our statutes regulating confessions," citing *Davis v. The State*, 8 Texas Court of Appeals, 510, and *Walker v. The State*, 9 Texas Court of Appeals, 38. In *Massey v. The State*, 10 Texas Court of Appeals, 645, the same rule is declared, upon the same authority. So, also, in *Kennon v. The State*, 11 Texas Court of Appeals, 356.

We have, we believe, referred to all the decisions bearing upon the question under consideration, and, as we understand them, there is a conflict between them, the earlier cases holding that our statute modifies the common law rule, and the later cases not recognizing such modification, but stating the rule precisely as stated at common law.

After much reflection upon the subject, we have concluded that the correct rule, under our statute, is the one declared in *Walker v. The State*, 2 Texas Court of Appeals, 326, and which we have hereinbefore stated and quoted. We think the recent decisions upon this question, commencing with *Davis v. The State*, 8 Texas Court of Appeals, 510, were the result of a misapprehension of the former decisions of our Supreme Court, and a failure to recognize the modification which we now think the statute has engrafted upon the common law rule. Such being our views, we now overrule all decisions which are contrary to the rule now declared to be the correct one.

In the case before us, the confessions of the defendant, though made under the influence of promises such as would render the same inadmissible in evidence, were corroborated by accompanying statements made by the defendant of extraneous facts conducing to establish his guilt, and found to be true, and were therefore brought fully within the provisions of our statute, and made competent evidence against the defendant. We hold that



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the court did not err in admitting the whole of the confession and statement of the defendant.

We find no error in the conviction, and it is affirmed.

*Affirmed.*

Opinion delivered May 17, 1884.

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[No. 3183.]

J. D. GARTMAN v. THE STATE.

**PERJURY—CHARGE OF THE COURT—PRACTICE.**—Article 746 of the Code of Criminal Procedure provides that "in trials for perjury no person shall be convicted except upon the testimony of two credible witnesses, or of one credible witness, corroborated strongly by other evidence, as to the falsity of the defendant's statement under oath, or upon his own confession in open court." The accused in this case not having confessed his guilt in open court, it was the imperative duty of the trial court to give in charge to the jury the substance of the above provision of the Code.

**APPEAL** from the District Court of Bell. Tried below before the Hon. B. W. Rimes.

The appellant in this case was convicted of the offense of perjury, and was awarded a term of five years in the penitentiary as punishment.

The State introduced R. H. Turner as its first witness. He testified that on the first day of December, 1883, a hearing on *habeas corpus*, in the case of the State of Texas v. G. P. Eckels, was held before the Hon. B. W. Rimes, judge of the fourteenth judicial district, sitting in chambers, in the county of Bell. The witness was at that time clerk of the district court of Bell county. The defendant was duly sworn, according to law, as a witness for said G. P. Eckels, and as such testified on that hearing. The testimony of the defendant was reduced to writing just as he gave it on that hearing. The witness produced the written testimony of the defendant as given on that trial, and read from it as follows:

"On the night of the killing I was standing on the sidewalk and saw Mr. Williams coming up the sidewalk, north. He was

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between Casey's and Eckels's. I saw him slap a little darkey down and curse him, and come up the sidewalk to opposite Eckels's door, and pull his hat down over his face with his left hand and pull a pistol with his right hand, throw it down, and say: 'G—d d—n you, I'll put an end to you,' and fired the pistol. When he shot at Eckels, he, Eckels, jumped back by the door, and Williams tried to shoot a second time, but his pistol snapped. Then Mr. Eckels pulled out his pistol and shot Williams in the breast. Then he shot Williams a second time in the breast. Mr. Williams then turned around and started to run, and as he, Williams, turned, Eckels shot him in the side, and then Williams fell, and Eckels shot him twice more with his pistol."

The witness Turner testified that the above is a part of the testimony of the defendant on the *habeas corpus* trial of Eckels, which was reduced to writing and signed by defendant.

J. M. Thompson testified, for the State, that he was a State's witness on the *habeas corpus* hearing in the case of G. P. Eckels v. The State. The witness was present and saw and heard the defendant testify in that proceeding.

The State then introduced in evidence the petition of George P. Eckels for the writ of *habeas corpus*, the judge's order on the same, the capias issued thereon, and the return of the same by the sheriff. The State further offered in evidence the indictment against George P. Eckels, charging him with the murder of L. T. Williams, on the thirty-first day of October, 1883, and the judgment of the court rendered on the *habeas corpus* trial of said Eckels.

T. J. Monroe was the next witness introduced by the State. He testified that, on the night Williams was killed by Eckels, he was with Williams, in Wiseman's saloon, which stood about thirty feet south of Eckels's store. He and Williams took a drink of whisky together, and walked out on the sidewalk. This was after dark, between seven and eight o'clock, but lights were burning in Wiseman's saloon and Eckels's store. Witness stopped on the sidewalk in front of the saloon. As Williams stepped out on the sidewalk, some one, witness did not know who, tapped Williams on the shoulder and said: "Let's go." That party and Williams started together up the sidewalk toward Eckels's store. When they had passed the first light in Eckels's store, a man whom the witness took to be George Eckels ran out and commenced firing at Williams from behind.

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Williams fell at the third shot. The shooting was very rapid. The first four shots were fired from the same pistol. At this time the witness stepped back into Wiseman's saloon, and saw nothing of the shooting that occurred just after that. This last shooting, the witness thought, was done with a gun. Witness did not hear Williams say anything, did not see Williams have a pistol, nor did he see Williams make any demonstrations at all toward Eckels. Witness had been in Wiseman's saloon with Williams for about half an hour. Williams had passed Eckels's door before the firing began. After the shooting was over the witness saw Williams lying dead on the sidewalk, about twenty feet north of Eckels's door. Witness had taken a couple of drinks that day, but was neither drunk nor under the influence of whisky. He did not see Williams strike a little darkey. He did not see Williams pull his hat down over his face just before the shooting.

Doctor M. K. Lott testified, for the State, that he saw the body of Williams after the killing, and examined it. He found four bullet holes, close together, in the back, three bullet holes, wider apart, in the breast, and one bullet hole in the breast, below the left collar bone. The holes appeared to have been made by pistol balls. The right shoulder was powder burned. The body had been undressed when witness saw it. The bullet holes in the back were smaller than those in the breast. They were blue around the edges, the discoloration being produced either by the balls or the powder which propelled them. The holes in the breast were larger, and were somewhat torn. The impression of the witness was that the balls entered the back of Williams and passed out through the breast. Williams had also been shot in the jaw. This wound, the witness thought, was inflicted by a buck shot from a shot gun. The wounds described were mortal, and were the immediate cause of Williams's death.

Bullet wounds on a body were, as a general rule, smaller at a point where the ball enters than where it emerges. There were four bullet holes in the back of Williams's shirt, but only three in front. The holes in the back were clean cut, but in front they were ragged, with torn edges, the cloth turned out. The vest had four similar holes in the back, and three in front. The coat had four holes in the back, with but two in front. The collar and shoulder of the coat appeared to have been grazed by buck shot, and frayed. A bullet fell from beneath the under-

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shirt, having evidently passed through the body, but not the clothing.

S. P. Elkins was the next witness for the State. He testified that he saw the killing of Williams, which occurred on the thirty-first day of October, 1883, in the town of Belton, Bell county, Texas, a little after dark. Witness was standing on the public square, between the court house and the front of Eckels's store, about sixty feet north of the latter point. Witness heard some one speak in the direction of Eckels's store, and looking in that direction, he saw Eckels present his pistol and fire at Williams. Williams fell at the third shot, and Eckels fired at him the fourth time. Williams struggled to a rest on his elbow. Eckels went back into his store, returned with a shot gun, and discharged it once at Williams. He attempted to fire the remaining barrel, but it snapped. He then reversed the gun, as though to strike Williams, but went back into the store, returned, either with the same gun reloaded or another, and fired twice more upon Williams, who was still down. Williams was north of, and had just passed Eckels's store, when he was first fired upon by Eckels.

On cross-examination, the witness stated that he could not tell what were the spoken words that attracted his attention to Eckels's store when the shooting commenced. His impression was that the words "look out" were uttered by some one, but he could not positively swear to that effect. Witness did not see Williams draw a pistol, or attempt to injure Eckels.

John Estes, colored, testified, for the State, that he was standing in front of Wiseman's saloon, and saw the killing of L. T. Williams. Williams walked out of that saloon apparently intoxicated. He brushed against the witness with his shoulder, and passed on until he got opposite Eckels's door, when he, Williams, was fired upon three times. Witness hear nothing said by any body just before the shooting, nor did he see or know who did the shooting. No one was walking with Williams at the time of the shooting. Witness watched Williams as he walked off, staggering, until he was shot.

J. H. Price was the next witness for the State. He testified that he saw the defendant Gartman at the house of his, the witness', father, about four miles north of Belton a few days after the killing of Williams. Witness at that time had heard none of the particulars of the killing, except such as he had read in the newspapers. The defendant then told, in the presence of

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witness and others, what he claimed to know about the matter, and to have seen at the time of the killing. He said that he saw Williams walking up the sidewalk toward Eckles's door, and that when he, Williams, got about opposite that door Eckles said to him, Williams: "G—d d—n you, I told you not to shoot him again," and commenced firing upon Williams with a pistol. Defendant further said in that connection that Williams had no pistol, and did not shoot. He said nothing about Williams slapping a negro down. The defendant was passing the night with the witness's father when he made this statement. He made this statement to witness in the presence of witness's father and mother. Defendant was then in that part of the county to fill an appointment to preach at the Rock Church.

William Richardson was the next witness for the State. He testified that he kept a livery stable in the town of Belton. He had a conversation with the defendant about his trouble after his, defendant's, arrest for perjury. The defendant told witness that he was in trouble. Witness asked if he could aid him in any way. Defendant replied that the witness could aid him and deliver him safely from his trouble, and requested the witness to testify for him as he, defendant, had testified on the Eckels *habeas corpus* trial. The defendant, when he made this request of the witness, knew that the witness did not see the killing of Williams. He knew that the witness did not come to Belton until some time after the killing of Williams, and was not in Belton at that time.

W. D. Higgins was the last witness for the State. He gave substantially the same account of the killing of Williams as that given by the previous witnesses.

Sam McWhirter was the first witness for the defense. He testified that he was past sixteen years of age. He was in Eckels's store at the time Williams was killed. As witness stepped into the store he saw Eckels standing in his open north door, facing southward. He tapped Eckels on the shoulder with his hand, and said: "Hello, George," and passed inside. Just then he saw Eckels draw his pistol, and at the same time heard a shot from the outside of the store. This shot seemed to come from a point south of the door, and distant, perhaps, eight or ten steps. Eckels commenced firing toward the outside. The witness thought that Eckels fired two shots southward from the door, one straight out in front, and one northward and downward, as if shooting toward the pavement. The witness thought that

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Eckels's pistol snapped several times. After he had discharged his pistol four times, Eckels went into his store, got a shot gun and fired it once and snapped it once. He then got another gun and shot it twice. Witness then ran out at the back door, home, returning after the shooting was over, through the rear of Tom Williams's saloon. He did not see the deceased, Williams, before the shooting, nor while the shooting was in progress. He saw Williams dead, at a point in the direction of which Eckels fired his last shot. Witness did not see who fired the first shot.

George P. Eckels was the second witness for the defense. He testified that he saw the difficulty in which Williams was killed. Witness, just before the difficulty, was standing in the front door of his store, and saw Williams coming northward toward him. He saw Williams pull his hat down over his eyes with his left hand, and with his right draw a pistol. He heard Williams say: "I will put the d—d son of a b—h out of the way." Williams then advanced toward witness, fired his pistol once, and attempted to fire again, but his pistol snapped. The witness thought that Williams was looking at him when he pulled his hat over his face.

J. T. Reese testified, for the defense, that the witness T. J. Monroe was in the habit of getting drunk every time he came to town. He took drinks of whisky in the witness's saloon on the evening of the killing of Williams, before the killing occurred, and was as drunk as usual. Witness saw Monroe take several drinks that evening.

Errors in refusing an application for continuance, in the charge of the court, and in the admission of evidence were the grounds relied upon in the motion for new trial.

*Boyd & Holman, and J. D. McMahan, for the appellant.*

*J. H. Burts, Assistant Attorney General, for the State.*

**WILLSON, JUDGE.** "In trials for perjury no person shall be convicted except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence, as to the falsity of the defendant's statement under oath, or upon his own confession in open court." (Code Crim. Proc., Art. 746.)

In this case, the defendant not having confessed his guilt in open court, it was incumbent upon the trial judge to instruct

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the jury that they could not convict except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence, as to the falsity of defendant's statements under oath. This was a part of the law of the case, and a very material part, and its omission was fundamental error. But even if it was not fundamental error, it was error which was excepted to by the defendant at the time of the trial, and must therefore necessarily cause a reversal of the judgment. (Clark's Crim. Law, p. 516, cases cited in note.)

We are of the opinion that the indictment is a good one, and, except the above named omission in the charge of the court, there is no error apparent of record. Because of that error alone, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered May 17, 1884.

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[No. 3057.]

JOSE ANGEL SEGURA v. THE STATE.

**MURDER—EVIDENCE—CASE STATED.**—A witness for the State, in a trial of a murder case, was permitted, over objection, to testify that on the morning of the day on which the deceased was killed, he rode up to where the deceased was at work; that the deceased seemed agitated and excited and told him that he, deceased, was afraid of that Mexican, meaning the defendant; that this conversation occurred about two hours before the killing occurred, and that the defendant was in sight at the time, but not near enough to hear the said conversation between the witness and the deceased. *Held*, that in the admission of such evidence the trial court erred, inasmuch as it was clearly hearsay, and did not come within any of the exceptions to the general rule which rejects hearsay evidence.

**APPEAL** from the District Court of McMullen. Tried below before H. W. Herron, Esq., Special Judge.

The indictment in this case charged the appellant with the murder of John Williams, in McMullen county, Texas, on the twenty-second day of April, 1880. The trial resulted in the appellant's conviction of murder in the first degree, and his punishment was affixed at a life term in the penitentiary.

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C. W. Barnes was first introduced as a witness for the State. He testified that he knew the defendant, and identified him in open court. He did not know John Williams, the deceased. The witness was one of the jurors summoned to hold the inquest over the body of the deceased. That inquest was held over the body in McMullen county, near Campbell's ranch, on or about the twenty-second, twenty-third or twenty-fourth of April, 1880. Judge Lowe, M. H. Martin, Doctor Frazier, R. W. Minus, witness, and a gentleman whom the witness did not know, were present. This party reached Campbell's ranch after sundown, and, next morning, made as thorough an examination as possible of all the circumstances of the killing. They looked for horse tracks near the place where the body lay, in McMullen county. Mr. Minus and Mr. Martin described a circle around the body twice, for a distance of two or three hundred yards. The witness circled around the body for more than a quarter of a mile. No fresh horse tracks were found either at the body or within the radius described by witness, Minus and Martin. A wound, evidently made with an ax, or some similar weapon, was found on the body of the deceased, just at the junction of the neck and shoulder. The deceased had been shot in several places. One ball entered the back of the head, which was powder burned, and passed out at the mouth. One struck the deceased on the chin, and another on the elbow. Two entered the back of the body, and passed out through the chest. Blood was first discovered within three feet of a fence where, evidently, some one had been at work. From this point a trail led zigzag to the point where the body was found.

The defendant was brought before the jury of inquest and interrogated. He said that he and the deceased were engaged in stretching a fence wire, and that, while he was passing under a wagon that stood by, three men came up, and a white man engaged the deceased in an excited conversation. He said that, as he passed through the fence to the horses hitched to the wagon, to hold them, one of the three men, a Mexican, met and struck him with a pistol, and told him to leave there; that he then ran off, and presently, while fleeing, heard five pistol shots fired in rapid succession. He continued his flight to Campbell's house, where he reported the occurrence. Examination for horse tracks was made. There was a small lake near by, where some colt tracks were found going down to and up from the water. The blood showed that the deceased ran directly across



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the grass plot where the defendant said that the horses stood when he left. Witness looked at the wound the defendant said he got over the eye, and it looked like an ordinary scratch. The jury of inquest rendered a verdict, but the witness did not know what had been done with the body. No arms were found on the body of the deceased. A belt and an empty pistol scabbard were buckled around the waist. When examined on the ground before the jury of inquest, the defendant said that, just before the assault by the three men, he went to get a piece of plank, but failed to get it. When examined in the afternoon, he said that he got the piece of plank, but did not use it. This was the only discrepancy between his two statements.

Cross-examined, the witness stated that he never saw a man struck with a six shooter. He did not think that the wound on the defendant could have been made with a six shooter. He did not think that a pistol sight could have made that wound. Defendant said that he had gone up the fence to get a piece of plank, and that, as he returned, a white man and two Mexicans rode up. The white man engaged the deceased in an excited conversation, and the deceased ordered him, defendant, to look after the two horses hitched to the wagon with which they were stretching wire; that he saw the white man strike the deceased with an old ax, and that he started toward the deceased, when one of the Mexicans struck him with a pistol; that he then ran, and after he had progressed a short distance in his flight, he heard five pistol shots in rapid succession. While on the ground, the defendant said that he cut a mesquite pole to put under the wagon axle, and pointed to it, and witness saw where it had been cut. The body had five wounds on it, one of them evidently inflicted by a dull instrument. This wound was deep—how deep, the witness did not know—and extended nearly across the neck. The witness could not say that a wound twenty-four hours old would appear larger than when first made. The witness had heard surgeons say that wounds inflicted by dull instruments drive the blood away, and that the blood will not adhere to the instrument. The ground was hard and dry at the point where the defendant said the horses stood. Defendant did not say that the horses stood there all the time. He said that both he and Williams stood near the wagon. No horse tracks were found either where the defendant said the wagon horses stood or where he said the horses of the three men stood. Witness went back to the place where the body was found, next

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day, and saw some colts pass over the ground, and saw that, in passing, they left plainly defined tracks. Those tracks were made after the examination at the inquest was made. Witness examined an ax produced on the examination, but found no blood on it. The break of the helve was fresh, and there was no blood on it.

Sheriff M. H. Martin testified, for the State, that he knew the defendant but did not know the deceased. On or about the twenty-second or twenty-third day of April, 1880, he received a note from Mr. Campbell to the effect that the body of a dead man had been found on his premises. Witness summoned a jury, and, with Judge Lowe, repaired to Campbell's ranch, arriving there after dark. The inquest was held next day. The witness heard but little of the testimony. A thorough examination of the ground was made, but no fresh horse tracks were found in the neighborhood of the body. Appearances indicated that some parties had been engaged in putting down posts whereon to stretch a fence. An old ax was found near the post where the blood was. The trail of the deceased was tracked by blood to the place where he fell. He was wounded in the manner described by the witness Barnes.

On his cross-examination, the witness said that he examined the ax, but found no blood on it. He did not know whether or not blood would adhere to a dull instrument. The handle of the ax had been cut off short and was split. It requires a hard blow to break an ax handle. The nature of the ground was hard and dry, though there was some grass on the hill. A shower of rain had fallen a few days before.

Judge M. F. Lowe, county judge of McMullen county, testified, for the State, that he knew defendant, but did not know deceased. He received notice from Campbell of the finding of a dead body on his ranch, on the twenty-second, twenty-third or twenty-fourth of April, 1880. He notified the sheriff, had a jury of inquest summoned, and repaired to Campbell's, reaching there about dark, and began the inquest at daylight next morning, on the ground. The witness did not remember the locality of the five or six wounds on the body. After viewing the body, the witness had the defendant sworn as a witness, and Mr. George Berksdale as interpreter. Defendant was asked in regard to the killing, and said that he went off to get a piece of plank to brace the axle of the wagon, in order to make the wheel revolve and stretch the wire they were using in making a fence, and when

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he came back he saw two Mexicans and a white man talking to the deceased in an excited manner; that of the words used he only understood the words "son of a b—h;" that as he crossed to the outside of the fence to hold the horses, he saw the white man take up the ax and strike the deceased; that deceased thereupon called to him, and he started toward deceased, when one of the Mexicans struck him with a pistol; that he then ran off a few feet and saw the white man reach for his six shooter. The defendant, as required, pointed out where he said the horses ridden by the three men stood, but no tracks or other traces could be found. He showed where he said the deceased was driving a staple in the post. Blood was found at that point, and also an old ax. Blood was also found where the defendant said the horses stood. Doctor Frazier tested the ax by wetting his finger and rubbing over it, and said that there was blood on it. Witness saw blood on the ax midway between the back and blade, and did not know but that there was blood on the blade. Mr. Barnes and Mr. Martin were present. All of the jury of inquest concluded that there was blood on the ax. From the point where the blood was first found at the post, where the staple was said to have been driven, to the point where the defendant located the horses, the distance was some eight or ten feet. The deceased, in running from the point where the blood was first discovered, as shown by his trail, passed over the ground where, according to the defendant's statement, the horses stood.

By agreement of counsel for the State and defense, the State read the testimony of John Donahue, as reduced to writing on the *habeas corpus* trial of J. M. and Duncan Campbell, charged with this same offense. The agreement recited that, without saying a predicate, the defense would be permitted to prove that said witness, Donahue, had made other and different statements to those made on the hearing under *habeas corpus*. That testimony was as follows:

"My name is John Donahue. I am acquainted with J. M. and Duncan Campbell. They are in court. One or two nights before Williams was killed, Duncan Campbell and his father concocted a plan to murder Williams. They made a contract with a Mexican, agreeing to pay him three hundred dollars to assassinate John Williams. That Mexican is Jose Angel Segura, the same who is now charged as principal for the killing of John Williams. Jose Angel Segura was working on Campbell's ranch,

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and owed the Campbells three hundred dollars, and they promised that they would discharge him from this debt if he would kill Williams, and would afterward pay him for his work. Duncan Campbell was interpreter, and was to go to Segura and make the trade with him, and give directions and make the plans as to how the man was to be killed. The conversation occurred at night between J. M. and Duncan Campbell, at J. M. Campbell's ranch. They were under a kind of brush arbor, about thirty yards from the house. I was behind some barrels and brush very near to them—not over six feet distant. They agreed that Segura should do the killing in the manner that I have stated. Duncan Campbell agreed to make the trade, and they both would help him out if he would stick to the tale they would make up for him. Williams was at that time working on a wire fence for J. M. Campbell, and was in camp where he was at work. Williams was going to leave the ranch as soon as he got through with the fence, which was the day he was killed. He would have gotten through with the fence on the evening of the day he was killed. He was killed between eleven and twelve o'clock in the daytime, two days after the agreement was made. I saw Williams after he was killed. I saw his dead body. I saw him about one hour or one and a half hours after he was killed, between eleven and twelve o'clock. I had not seen him before for three or four days. He was lying on his face, and there were five bullet holes in him, and a cut on his neck or collar bone. This was in McMullen county.

“The defendants (the Campbells) left the night I heard the conversation, before I did. I was there when they went there. I happened there accidentally. That was in the early part of the night, a little after dark. I was standing so they would not be apt to observe me. I was on the ranch the day that Williams was killed. Duncan Campbell was out on the range, and J. M. Campbell was at his house. Segura was to report to J. M. Campbell when the murder was committed, and J. M. Campbell was to send after Duncan Campbell, who was to fix up the story for the Mexican about the killing. The Mexican was to kill Williams at no particular place, but on the fence where he was working. Duncan was to be out on the range in company with his hands, so that he could be proved out. J. M. Campbell was to be at his house so that he could prove out. Duncan Campbell was to go to Segura the night I heard this conversation. Segura lived about one hundred and fifty yards from J. M. Campbell's

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house. I saw Segura directly after the killing was done, or about a half hour after the killing. He had blood on his face. Segura and Campbell came down to the wool house where I and Cunningham were, and said that Williams was killed, and asked us to go down where the body was. We all ate dinner and went down. It was probably one o'clock when we got there. The body was stiff when we got there. The weather was very hot.

"In the conversation I heard, as before stated, between J. M. and Duncan Campbell, J. M. Campbell told his son that Williams was going to leave there, and was going to break them up, and that they would have to kill him to stop him. J. M. Campbell did the talking and Duncan agreed with the old man. I saw Duncan Campbell after the killing. Segura reported the killing, and then went in search of Duncan Campbell. J. M. Campbell told Segura to go out and bring Duncan in, but not to speak to anybody about the killing until after he saw Duncan. We met Segura and Duncan when we were coming from Williams's body. Segura stayed on the ranch after the killing till he was arrested, which was in a few days. The defendants were both on the ranch when arrested."

Cross-examined: "I had lived on Campbell's ranch seven or eight years before this happened. Segura had been there about five years, and Williams about six months. I was acquainted with all the places I have spoken about. It was directly after dark when I heard the conversation. I don't remember the day of the week or the month. The moon was shining. I was standing up when I heard this conversation, on one barrel on the top of another. The brush was mesquit. There was brush and barrels between me and J. M. and Duncan Campbell, when I heard this talk. I accidentally stopped there. The Campbells came up when I was there. I never told Williams of this conversation, nor the wife of Williams, who lived in the same house that I did. Myself and Williams were friendly. I never told Rufus Holland while I was in jail here that Tal McNeil had Williams killed. I don't remember that I told Green Alford that Duncan Campbell had nothing to do with the killing of Williams. I never saw Duncan Campbell and Segura together after I heard the conversation till Williams was killed. Neither I, J. M. or Duncan Campbell were at any usual place the day that Williams was killed. Williams was killed in 1880. The reason I never said anything about this before was because I

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was at Campbell's ranch, and had my stock at Campbell's ranch; and I never said anything about it for three and a half years afterwards because I was afraid they would kill me. McKenzie will tell the truth about what I told him before court met, as to what I was going to testify to before the grand jury, and as to what he, McKenzie, told Campbell before the grand jury met. I lived at Campbell's for about one and a half years after Williams was killed."

Re-direct: "I never told Campbell anything about overhearing the conversation. Mr. Alford will tell the truth about anything I may have told him about the killing. He may be mistaken about the subject matter in mixing another thing with this."

Recalled: "I did not tell Bowen on the Gould ranch last December, that I was afraid to go down about Lagarto, on account of the McNeil and Williams matter."

It was admitted that if Doctor Frazier was present he would testify that there was a wound on the back of John Williams's neck, seemingly inflicted by some sharp instrument; that he saw an old ax with a broken helve near where the body was found; that there was a little blood on the ax, but that he could not say that it was human blood, or how long it had been there; that he was with the jury of inquest and examined the body and wounds of the deceased.

Green Ussery was the next witness for the State. He testified that, in 1880, he knew both the deceased and the defendant. On the day that Williams was killed, in April, 1880, witness saw him at work on a fence. This was two or three hours before the killing. Witness rode up to where he was at work. Witness did not see the defendant there, but heard him calling. Deceased had on a pistol at that time. As the witness rode up, his horse shied, being frightened at Williams. Williams remarked that witness's horse was by him, as he, Williams, was by the Mexican; that witness's horse was afraid of him, and he was afraid of the Mexican, and that such fear was the reason he was wearing arms. Two hours afterward, Williams was killed. This was admitted over objections by the defense.

Cross-examined, the witness said that he did not know when Williams was killed, more than that it was that day. The Mexican Segura was not close enough for witness to see him. Deceased was excited, because, he said, the Mexican would kill him. He called the Mexican to tighten the wire. Witness then

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left them. The defendant did not hear the conversation between the deceased and witness.

Judge M. F. Lowe was recalled by the State. He testified that the defendant made two statements concerning the killing on the day of the inquest. At the body, when Berksdale acted as interpreter, he said that the white man of the assaulting party struck deceased with the ax. Afterward, at the house, when Duncan Campbell acted as interpreter, he said that the deceased and the man hitched first, that the man struck deceased first with his fist, and then with the ax. These statements he made in Spanish, a language spoken and understood by witness. At this point the State closed.

Duncan Campbell was the first witness for the defense. He testified that he was the son of J. M. Campbell. He knew the defendant, and he knew the deceased when he was killed, on or about April 21, 1880. The witness was present at the inquest held at the house, and on that occasion acted as interpreter. The witness did not remember all that the defendant said in his statement before that inquest. He did remember, however, that the defendant said that a white man and two Mexicans came to the fence where he and deceased were at work, and that the white man killed the deceased. This statement the defendant made to the jury at the house. The defendant said that the white man shot the deceased, but witness did not remember that he said that the white man struck deceased. The deceased had been on J. M. Campbell's ranch for about six months. He, deceased, and the defendant always appeared very friendly. The defendant was indebted to J. M. Campbell at the time that the deceased was killed.

The witness had known John Donahue, the man whose written testimony was read by the State in this case, for eight or ten years. Witness and his father had no understanding with the defendant to kill the deceased. The relations between witness, his father and the deceased, had always been of the kindest nature. J. M. Campbell could speak the Spanish language fluently, and needed no interpreter to deal with the defendant. The defendant was, at the time of the killing, living in a small house on the ranch. The deceased, his wife and child, lived in a store house on the ranch. Donahue was in deceased's house the night before the killing. The brush arbor spoken of by Donahue was about half way between J. M. Campbell's residence and the house occupied by the deceased. Two boxes.

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each about two feet deep, stood under the arbor. No one could stand under that arbor without being seen. The two boxes spoken of were not piled the one on top of the other. The witness emphasized his denial that there ever was an understanding between himself, his father and the defendant, looking to the assassination of the deceased. The witness had no idea of the death of the deceased until he heard of his assassination. The deceased and defendant were together on the day of the homicide. Deceased expressed then no apprehension of being killed. He never at any time expressed fear of defendant, or his belief that defendant contemplated his murder. On the contrary, he and the defendant were always on friendly terms. The deceased never asked to be relieved from work with the defendant.

Cross-examined, the witness said that Donahue and the deceased occupied the same house on the ranch. The witness, though not positive, thought that Donahue spent the night before the killing in the deceased's house. The witness thought so because he saw Donahue on the ranch next morning. Deceased passed the night preceding his death at his house. The witness had never had a conversation with the deceased about hides on the place. About the time of the killing, the deceased was finishing up his work, and was going to leave the ranch. The arbor spoken of by Donahue was constructed of four poles stretched from four upright posts, the top covered over with brush, and was about eight or ten feet high. Two empty boxes and a half barrel stood under the arbor. It was utterly impossible for a man to have stood under that arbor and not be seen. The arbor shade might have produced some darkness.

Re-examined by the defense, the witness stated that the arbor squared about ten feet. There was no brush on the ground about it. The boxes were lying down on the ground, and the half barrel was off to itself, filled with sheep dip. Donahue habitually slept in the house of the deceased. He ate breakfast at the ranch on the day of the killing.

J. M. Campbell was the next witness for the defense. He testified that the defendant lived on his ranch five or six years. At the time of the death of Williams, the defendant was indebted to witness for three or four months' wages at the rate of twelve dollars per month. The witness's and the deceased's relations at the time of the killing were of the friendliest character. Witness knew John Donahue. Donahue ordinarily slept at the house of the deceased. The witness could not say that he slept



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there on the night before the killing. The witness saw him on the ranch late that night, and early next morning before sunrise saw him coming from Williams's house. He ate breakfast at the witness's house on that morning (the morning of the killing), and witness saw him and the deceased together on that morning, on the ranch.

The arbor which figures in this trial was constructed of four forks, four to six inches in diameter, driven into the ground eight feet apart, of sufficient height for a tall man to stand under. Two bacon boxes were under the arbor, placed there to feed lambs in. One was turned upside down, to put milk on; the other was turned open side up, so placed that the wife of witness could stand in it when feeding lambs. The boxes were each about two feet in depth, and lay side by side. There was also a half barrel of sheep dip under the arbor. There were no barrels piled up under it. A child could not have stood in that arbor unseen. Witness never had an understanding with Duncan Campbell about the killing of Williams. He had never mentioned the subject of hides to Duncan Campbell, in connection with the deceased. He had never heard Williams say anything about hides. Williams was killed on April 21, 1880. The defendant was the first man who told the witness of the killing. He, defendant, came to the witness at his house, much excited, and told witness that a white man and two Mexicans came to where he and Williams were at work; that the white man and Williams quarreled; that the white man shot Williams, and that he himself received a blow. He said nothing about the white man striking Williams. He was very much excited, and said that he had no hand in the fight. Witness took his, defendant's, pistol from him, and found it loaded all around. The pistol was of forty-five calibre, the same sized pistol as that owned by Williams. There were no forty-five calibre cartridges on the ranch except those owned by Williams. Williams was to have left when the fence was finished. The witness did not, and would not have discharged him, as he was too desirable a hand. Williams was quitting voluntarily, saying that he was going to Louisiana. Williams had never said that he would tell things on the witness; he knew nothing to tell. Donahue left the witness's ranch in February, 1883, just before the March term of court convened. Witness kept a stallion when Donahue left, against Donahue's will, as it was witness's money which paid for the stallion, and that fact accounts for Donahue's enmity to

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witness. Witness and Duncan Campbell were indicted in this case, at the March term of the court, 1883.

Cross-examined, the witness said that the defendant had his own pistol, and could get cartridges from no one on the ranch except Williams. He could not leave the ranch to get cartridges. Witness had no forty-five calibre cartridges. From the corner of the witness's house to the wool shed the distance is about one hundred and fifty yards. The arbor was between the houses of deceased and witness, but not in an exact line. It was high enough for a tall man to stand under, and was partly covered by brush. Neither a man nor a child could stand unseen under that arbor. A child could possibly secrete itself in the open box. The moon shone brightly on the night of the alleged conversation. The witness was out that night, and saw the moonlight. Reflection from the moonlight would not have produced darkness under the arbor. The defendant was crying when he told witness of the killing of Williams. It did not even enter the witness's mind that the defendant committed the homicide.

Mrs. J. M. Campbell was the next witness for the defense. She testified that she was the wife of the last witness. She knew the parties variously accused of this offense, and she knew deceased in his lifetime. Deceased, defendant, J. M. and Duncan Campbell and witness were all on friendly terms at the time the killing occurred. Witness had never known of the existence of unpleasant feelings between any of them. The arbor described by previous witnesses was originally built for washing purposes, but was not so used in April, 1880. Witness had some pet lambs on the place when Williams was killed. She fed them and cared for them under that arbor, and for that purpose had two boxes and a half barrel of sheep dip placed there. She stood in one of the boxes to prevent the lambs from soiling her clothes, and she fed them milk on the other box. There was no brush about the arbor except on top, nor was there other obstruction to the view inside that arbor at the time of the killing of Williams or afterward. The deceased lived in a house on the ranch with Donahue, and he and Mr. and Mrs. Williams were perfectly friendly. They, the Williamses, and Donahue were in the same house together on the night before the killing. There was no difficulty prior to the killing between any of the parties. Donahue had one wooden leg. An effort was made to keep Williams on the ranch.

Rufus Holland was the next witness sworn for the defense.

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Statement of the case.

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He testified that he knew Donahue. When he, witness, and Donahue were in prison together, Donahue told him that McNeil killed Williams. The witness had lived in the neighborhood since 1856, and knew Donahue's reputation for truth and veracity. It was not good. Witness would not believe him on oath.

Cross-examined, the witness said that he supposed the population of the town of Tilden to be about three hundred, and of the community, including Tilden, some four or five hundred. Out of this number he had heard six or seven persons say that they would not believe Donahue on oath. He heard these parties say so on the day of this trial. He had heard others make the same statement. These parties included W. P. Crain, James Lowe, senior, and Frank Drake. He had never heard any one say that they would believe Donahue on oath.

Mr. McKenzie testified that he had lived in Live Oak county since 1860, and was sixty years old. Witness knew John Donahue. Donahue told the witness that Campbell had no more to do with the killing of Williams than he, witness, had. On or about the eleventh day of August, 1883, previous to the fall term of court, Donahue came to the witness's house to early breakfast. As the witness entered the dining room, Donahue said to witness that he had been staying in the brush for several days, and that he had just come in, and had prevailed upon witness's daughter Mary Ann to get him some breakfast; that he had become somewhat frightened, and had been staying for some time at Alford's camp; that Campbell had men out hunting him to kill him. The witness replied to him: "You are in no danger. That is one of your old tales, and I see that Campbell has not killed you yet." Donahue then brought up the subject of the Williams murder, and said that he knew who killed Williams. Witness asked him if he meant to say that Mr. Campbell knew anything about it. He replied that he thought Mr. Campbell knew all about it. Witness then asked him: "John, what makes you talk that way?" He replied that Campbell had ridiculed him, and that he had to say something as an offset, or people would believe that he was a bad man; that if he, Donahue, was taken before the grand jury it would be "good-bye Campbell." Donahue's reputation for truth and veracity was bad, and, from his knowledge of that reputation, the witness would not believe him on oath.

On cross-examination, the witness said that he knew Donahue in Live Oak county, and had known him for ten years. He knew the opinion of Donahue entertained by his neighbors,

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Statement of the case.

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Donahue stayed in that neighborhood frequently as long as three months at a time. He had never remained in the neighborhood at any one time as long as three years. As long before this trial as three or four years the witness heard three or four persons say they would not believe Donahue on oath. He had heard others say so since. He had heard others say so before, among them Mr. McGivens. The words used by Donahue at witness's breakfast table were that "if he went before the grand jury it would be good-bye Campbell."

Green Alford testified, for the defense, that Donahue, on the Nueces river, told him that Duncan Campbell had no more to do with the murder of Williams than the witness had.

Major T. T. Teel testified, for the defense, that when the defendant was indicted he, witness, was acting as the prosecuting attorney. Donahue was examined before the grand jury, and said that he knew nothing at all about the killing. He was urged to tell all if he knew anything, but said first and last that he knew nothing.

Frank Drake testified, for the defense, that he was a member of the grand jury in June, 1880, when the Williams murder was investigated. Donahue was examined in regard to that killing, and said that he knew nothing about it.

Frank S. Dixon testified that he was foreman of the grand jury in June, 1880, and examined Donahue when the Williams murder case was under examination. Donahue said that he knew nothing about it. He said nothing about a plot.

Cross-examined, the witness said that Donahue adhered to his statement throughout the examinations before the grand jury, that he knew nothing about the killing of Williams. As he appeared to be an unwilling witness, prosecuting attorney Teel had him brought before the grand jury a second time, and examined him closely. From first to last he adhered to his original statement, that he knew nothing about the killing.

Wiley Williams testified, for the defense, that he knew the man Donahue. Two or three weeks after the killing of Williams, witness talked to Donahue about it. Donahue then stated positively that McNeil killed Williams, and that neither the defendant nor the Campbells had anything at all to do with it. Witness knew that Donahue's reputation for truth and veracity was bad, and he would not, knowing his reputation, believe him on oath.

Cross-examined, the witness stated that he first formed Dona-

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Opinion of the court.

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hue's acquaintance in Live Oak county, in 1875. He had heard Mr. Harman, of Live Oak county, say that he would not believe Donahue on oath. He had never heard any one in McMullen county say that he would not believe Donahue on oath. Witness had heard Doctor Dilworth and Mr. Yarbrough say that they would not believe Donahue on oath.

R. S. Ray testified, for the defense, that he had known Donahue since 1875. They had lived about four miles apart, and the witness was, to some extent, acquainted with his reputation for truth and veracity, and knew, from what was generally said by people, that his reputation was very bad. Witness, knowing his reputation, would not believe him on oath. Witness could recall but few he had heard say so. He had never heard the district attorney or the district clerk say they would not believe Donahue on oath. He did hear the prosecuting attorney, when prosecuting Donahue for theft, denounce him as a thief, liar, scoundrel and villain, but not as a perjurer.

Among others, the question considered in the opinion was assigned as ground for new trial.

*J. M. Eckford*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** It appears from a bill of exception in the record that, upon the trial of this case, the state proved by one Ussery that on the morning of the day the deceased was killed, he, witness, rode up to where the deceased was at work; that deceased seemed agitated and excited, and told witness that he, deceased, was afraid of that Mexican, meaning the defendant; that this conversation occurred about two hours before deceased was killed; that defendant was at the time in sight, but was not near enough to hear said conversation between deceased and witness. This testimony was objected to by the defendant, because it was hearsay and not part of the *res gestæ*, and the statements of deceased were not made in the presence of the defendant.

We think the court erred in admitting the testimony. It was clearly hearsay, and did not come within any of the exceptions to the general rule which rejects hearsay evidence. (*Campbell v. The State*, 8 Texas Ct. App., 84; *Green v. The State*, Id., 71; *Booth v. The State*, 4 Texas Ct. App., 202; *Anderson v. The*

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*State*, 14 Texas Ct. App., 49; *Hammel v. The State*, Id., 326.) Under the peculiar circumstances of this case, this illegal evidence was material, and calculated to affect the defendant prejudicially. But whether or not it was prejudicial to the defendant, its admission was such error as must reverse the judgment. (*Tyson v. The State*, 14 Texas Ct. App., 388.)

Several other questions are presented in the record, and in the brief of counsel for defendant, but they are not such as are likely to arise on another trial of the case, and, not being of general importance, we deem it unnecessary to consume time in their investigation and decision.

Because the court erred in admitting incompetent testimony, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered May 17, 1884.

16	286
28	496

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[No. 3113.]

CHARLES BENNETT v. THE STATE.

1. PRACTICE IN THIS COURT.—STATEMENT OF FACTS, unless authenticated by the trial judge, will not be considered by this court for any purpose whatever.
2. THEFT FROM THE PERSON—EVIDENCE.—INDICTMENT for the theft of a watch and chain from the person of the owner alleged the aggregate value of the two articles. *Held*, not error to admit evidence of the value of the watch alone.
3. SAME.—THEFT FROM THE PERSON is, *per se*, a felony without reference to the value of the article stolen, if of any value whatever.

APPEAL from the District Court of Denton. Tried below before the Hon. C. C. Potter.

The conviction was for the theft of a watch and chain from the person of L. Torply. The punishment awarded was a term of three years in the penitentiary.

The matters embraced in the second and third head notes of this report were, with others, assigned as grounds for new trial.

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Syllabus.

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No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

WILLSON, JUDGE. 1. There is no statement of facts in the record such as we can consider. There is a paper in the record which purports to be a statement of facts, but the same is not authenticated by the trial judge, and cannot therefore be regarded. (*White v. The State*, 9 Texas Ct. App., 41; *Myers v. The State*, Id., 157.)

2. This being a prosecution for theft from the person, it was sufficient to allege in the indictment that the watch and chain alleged to have been stolen were, together, of the value of thirty-five dollars, without alleging the separate value of the articles; and such allegation being in the indictment, it was not error to admit evidence as to the value of the watch alone. In a prosecution for theft from the person, there is no grading of the offense by the value of the property stolen, as in the case of ordinary theft. The offense is a felony if the property stolen from the person is of any value whatever. (Penal Code, Art. 744; *Flynn v. The State*, 42 Texas, 321.)

In the absence of a statement of facts, other questions presented in the record cannot be considered. The judgment is affirmed.

*Affirmed.*

Opinion delivered May 17, 1884.

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[No. 3033.]

JOHN ALLEN v. THE STATE.

1. PRACTICE—EVIDENCE—WAIVER.—The State presented in evidence the affidavit of the owner of the alleged stolen property, to the effect that he never gave his consent to the taking of the property. To this affidavit was attached an agreement signed by the State's counsel and by the defendant and his counsel, and an attesting witness, to the effect that the affidavit should be read in evidence as the testimony of said owner. When offered, the defendant objected to it because, 1, the defendant had the right to be confronted by witnesses against him; and 2, because it was not proved that the defendant had ever signed the agreement. *Held*,

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that the first objection was not tenable because the defendant had the personal power to waive any right secured to him except the right of trial by jury. *Held*, further, that the second objection was tantamount to a denial that the defendant executed the agreement. Under such circumstances it was incumbent on the State to prove its execution, either by the attesting witness, if accessible, and if not, by competent secondary evidence, before the agreement or affidavit could be received in evidence. See the opinion *in extenso* on the question.

2. CHARGE OF THE COURT.—CIRCUMSTANTIAL EVIDENCE alone being relied upon by the State to secure a conviction in this case, it was the imperative duty of the court, whether asked or not, to give in charge the law controlling such evidence.

APPEAL from the District Court of Mitchell. Tried below before the Hon. T. B. Wheeler.

The indictment in this case charged the appellant with the theft of one head of cattle, the property of one C. C. Slaughter. His trial resulted in conviction, and he was awarded a term of two years in the penitentiary.

The State first introduced an affidavit sworn to and subscribed by C. C. Slaughter, to the effect that he had never given the defendant his consent to the taking of the animal. Preliminary to this evidence the prosecuting attorney read an agreement, signed by himself on behalf of the State and by the defendant and the defendant's former attorneys, and attested by one Robinson, to the effect that the affidavit should be read in evidence on the trial, as the testimony of C. C. Slaughter. The said agreement waived the presence of the witness Slaughter.

Dave Earnest was the first witness placed upon the stand by the State. He testified that he had known the defendant for several years. He saw the defendant in Tom Green county, on Lacey creek, about fifty miles south of Colorado, on or about the first day of December, 1881. His wife, his son John, a young man about twenty years old, his grown daughter, or step-daughter, and a boy fourteen or fifteen years old were with him. They were then living in two tents. The defendant had a herd of about fifty head of cattle, which he claimed to own, and over which he exercised control. The witness cut a steer out of this bunch, and had some contention with the defendant about its ownership. The defendant claimed that he owned the cattle. The cattle claimed by the defendant were branded JHC, connected. About one month later the witness went to the defendant's camp at Baldwin Springs, Martin county, about seventy



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miles west of Colorado. This was about the first of January, 1882. Mrs. Allen, her daughter, or step-daughter, and the boy were at the camp at the time. They were living in two tents, and had in charge the same herd of cattle they had on Lacey creek, in Tom Green county. The witness recognized them as the same cattle by their appearance and brands. The herd numbered fifty or sixty head, the brands on more than half of them being fresh, and covering old or original brands. Witness did not see either the defendant or his son John at the Baldwin Springs camp on this visit. The settlement nearest this camp was thirty miles distant. Several rangers and one cowboy were with the witness at the Baldwin Springs camp. About ten days later witness was at Big Springs, in Howard county, and there saw twenty-five or thirty head of the same cattle he had seen in the herd at Baldwin Springs. The cattle were then in charge of Sheriff Ware, Ira Butler and several others, including some State rangers. They were driving the cattle toward Colorado City. Witness knew C. C. Slaughter. Slaughter was then living in Dallas. Witness had seen defendant hauling buffalo bones twice before he saw him on Lacey creek, in Tom Green county.

Ira Butler was the next witness for the State. He testified that at present and in the year 1881 he was cattle and hide inspector of Mitchell county. On or about the fifteenth day of January, 1882, he went to Baldwin Springs, or "Five Wells," as the place is sometimes called, in Martin county, to look after some cattle. He reached the springs between daylight and sunrise. He found the defendant's family camped there, living in two tents. Mrs. Allen, another woman, a boy about fifteen years old, and a man named Meek were at the camp when witness arrived. He did not see the defendant there at the time. Baldwin Springs was about thirty miles west of Big Springs, its nearest settlement. Witness found fifty or sixty head of cattle at the springs, some of which were claimed by Mrs. Allen as her separate, individual property. The brands on more than half of the cattle were fresh, and the old or original brands were burned or blotted out. Witness and his party brought off the cattle that had been rebranded, and on which the old brands had been blotted, leaving those Mrs. Allen claimed as her individual property. Those they took the party brought to Colorado City, where several were claimed and proved by various owners. The old brands on some of the cattle had been so burned and blotched that their

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identification was impossible. These were subsequently sold, and the proceeds turned into the county treasury. Frank Vaughan, who was acting as the agent of C. C. Slaughter, and was looking after Slaughter's cattle, made affidavit that one cow belonged to C. C. Slaughter, and witness turned the cow over to him. When this cow was claimed by Vaughan the herd was being held on Lone Wolf creek, about a half mile east of the town of Colorado. The cow to which Vaughan made affidavit as the property of Slaughter was branded  $\infty$  (recumbent), otherwise called a "long S;" also a sign somewhat in the shape of a T, known as a "fleur-de-lis." Slaughter was then a resident of the city of Dallas. The long S brand had been recently burned or blotted, by running a hot iron through it, and another brand, which resembled JHC, connected, was found burned on the cow when claimed by Vaughan. The rebranding and the blotting of the old brand were recent, about four weeks old, and appeared to have occurred at the same time. The record of brands of Mitchell county showed Slaughter's cattle brand to be a long S on each side, and his mark to be an underbit in each ear.

J. M. McKenzie was the next witness for the State. He testified that he went with sheriff Ware, hide inspector Butler, Captain McMurray and others, to Five Wells or Baldwin Springs, in Martin county, to look after some cattle, in January, 1882. They secured the cattle they went for. The animals were in very bad condition and had evidently been close herded for some time, and many of them, as shown by creased hocks, had been hobbled. Of the sixty head of cattle found at the Wells, about half of them had been rebranded, the old or original brands being burned or blotted out. The defendant was not at the Wells when the party arrived. His wife, another lady, a boy fourteen or fifteen years old, and Mr. J. J. Meek were there. All of the cattle that had been recently burned or rebranded were taken by the party and driven to Colorado Springs. Five Wells or Baldwin Springs was a place on the plains, distant thirty miles from either settlement or ranch. The burning or blotching of the old brands seemed to have been done by drawing a hot iron across them. The burns and the new brands were beginning to peel when the cattle were taken, and appeared to be about thirty days old. Some of the old brands were so completely obliterated by the burning that identification was impossible. Several of the cattle, when brought to Colorado City, were identified

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Statement of the case

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and claimed by different owners, and among them one was claimed for Mr. C. C. Slaughter. The witness saw one of C. C. Slaughter's cows in the bunch brought to Colorado City. Witness did not think he ever saw the defendant in possession of or exercising control over any of the twenty-five or thirty head of cattle brought to Colorado City from the Five Wells.

Frank Vaughan testified, for the State, that he was a resident of Mitchell county, and followed the cattle business. In January, 1882, he saw a bunch of twenty-five or thirty head of cattle herded on Lone Wolf creek, about a half mile from Colorado City, by sheriff Ware, inspector Butler, and some State rangers. Among them he found a cow belonging to Mr. C. C. Slaughter, for whom the witness was working at that time. Witness made affidavit of Slaughter's ownership, and received the cow from inspector Butler. Witness did not know where Slaughter was at the time that the cow was taken. This cow had two old brands on her, a long S, which was Slaughter's regular ranch brand, and the sign of the *fleur-de-lis*. This last was not Slaughter's regular brand, but was a road brand he had put on a large number of his cattle. Of late years Slaughter had put the long S brand on both sides of the increase of his cattle. His old cattle are so branded only on one side.

The long S brand on the Slaughter cow recovered by the witness had been mutilated by drawing, with a hot iron, two bars across it lengthwise. A fresh brand, JHC, connected, had also been burned on her. The fresh brand and the mutilating bars were evidently put on her at the same time, which, judging from appearances, was about four weeks before the cow was recovered. Witness saw other freshly branded and brand burned cows in the same bunch when he recovered the Slaughter cow. Witness had never seen the cow in defendant's possession, and did not know who burned the old brand, or who rebranded her JHC.

Sheriff Ware was the next witness for the State. He testified that he had partially known the defendant for the last seven years, and had frequently seen him in Mitchell and Howard counties. Witness, with inspector Butler, Captain McMurray and several rangers, went to defendant's camp, at Baldwin Springs, in Martin county, in January, 1882, arriving there about daylight. Mrs. Allen, defendant's wife, Mrs. Blair, her step-daughter or daughter-in-law, a fifteen-year-old boy, and a man named Meek were at the camp, at which place some fifty

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or sixty head of cattle were also found. Defendant was not at the camp. Witness and party hunted over the neighborhood, an open plain covering several miles, until after midday, for the defendant, but could not find him. The party then rounded the cattle up. Mrs. Allen claimed about twenty-five head of the cattle as her individual cattle. These were cut out and left, and the remaining ones were brought to Colorado City. None of the cattle left with Mrs. Allen were fresh branded or burned. From that time on, the witness made unsuccessful search in Texas for the defendant.

Baldwin Springs, or Five Wells, was seventy miles west of Colorado City, and, at that time, was far west of any settlement. The railroad had been built through that country, but neither ranch nor settlement was nearer than Big Springs, in Howard county, thirty miles distant. A section house stood at Marionfield, about seven miles south of Baldwin Springs. Some time later, the witness heard that the defendant was in the Territory of New Mexico, about four hundred miles from Colorado, and he went there and arrested defendant and his son John, junior. Defendant's family had then joined him in New Mexico. The arrest was made in September, 1883. John Allen, junior, has since died. Witness at no time saw the defendant in possession of the cattle.

J. J. Meek testified, for the State, that he lived in Wilbarger county, Texas. Witness first saw the defendant several years before this trial, when he, defendant, was engaged in hauling buffalo bones to market. Witness last saw him, before this trial, in January, 1882. Witness was then hunting buffaloes, and was camped on the extreme edge of Martin county, near the Andrews county line. The defendant and his son, a young man about twenty years old, came to witness's camp together. Witness had sprained his ankle, and was not able to do much, and wanted to get home. Defendant proposed to buy a buffalo gun the witness had, for which he agreed to pay fifty dollars in yearlings at six and a half dollars each. He told the witness that he had about seventy head of cattle at the Baldwin Springs. Witness agreed to go to defendant's camp and get the yearlings. *En route* the defendant said that he might be able to sell more cattle to witness. Witness and the Allens, traveling horse back, reached defendant's camp about dark. Defendant's wife, another woman and a boy were living there in two tents. After supper, the defendant and his son went off, and the witness did

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not see them again. Next morning, at daylight, sheriff Ware and his party came to the camp and drove off a part of the cattle. Witness next saw the defendant on this trial.

The motion for new trial raised the questions discussed in the opinion.

*C. C. McGinnis*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State

WHITE, PRESIDING JUDGE. On the trial the State offered in evidence the affidavit of Slaughter, the alleged owner of the stolen animal, to the effect that he had never given defendant his consent to the taking of the animal. To this affidavit was attached a written agreement, signed by the district attorney and also by the defendant, as well as by his attorneys, in which agreement it was stipulated that said affidavit should be taken as his (Slaughter's) full and unqualified evidence on this trial; "and that said statement is to be taken and admitted and read in evidence as the testimony of said Slaughter, without reservation, by both parties, as all that said Slaughter knows or can testify to in the said cause; and that said statement be taken and admitted in evidence as of the same weight and merit as if the said witness, C. C. Slaughter, were present at the trial of said cause, and making under oath as a witness the said statements that are included in said affidavit." This agreement was witnessed by T. J. Roberson.

Two objections were interposed by defendant to the introduction of this affidavit and agreement as evidence. "1. That defendant had the right to be confronted by the witnesses against him. 2. It was not proven that defendant had ever signed the agreement that the same should be read in evidence." These objections were overruled, and the affidavit and agreement admitted in evidence, and defendant saved a bill of exceptions to the ruling.

So far as the first objection is concerned, it was not tenable. "The defendant to a criminal prosecution for any offense may waive any right secured to him by law except the right of trial by jury in a felony case." (Code Crim. Proc., Art. 23.) Here the defendant in person agreed that the affidavit might be read in evidence, and he expressly waived the personal attendance of the witness. This case is not like the case of *Bell v. The State*,

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2 Texas Court of Appeals, 215, in which it was held that such an agreement made by the attorney for defendant was not legal or binding upon him. Such an agreement, to be binding, must be made by the defendant himself, as was done in this case.

The second objection, we think, was tantamount to a denial that defendant had signed the agreement in writing to waive the personal presence of Slaughter as a witness. This brought the execution of the writing, that is, the written agreement, in question. It is a rule of evidence, well settled, that "if the execution of an instrument is to be proved, the primary evidence is the testimony of the subscribing witness, if there be one. Until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is in general admitted." (1 Greenl. Ev., 13 ed., sec. 84.)

"So resolved," says Mr. Wharton, "are the courts in insisting on this rule, that in cases where subscribing witnesses are necessary, a party's admission has been held insufficient to dispense with the production of the attesting witness, even though such admission be made in open court." (1 Whart. Ev., sec. 725. See *White v. Holliday*, 20 Texas, 679.) These are the rules where attesting witnesses are necessary to the validity of the instrument. "Where attesting witnesses are not necessary to the validity of the instrument, it may be *prima facie* proved by the admissions of the party, provided such admissions are clear and specific as to the writing. \* \* \* And such admission may be proved inferentially as well as directly." (1 Whart. Ev., sec. 725; 2 Whart. Ev., 2 ed., sec. 1092.)

In this case it was not necessary that there should have been an attesting witness to the execution of the written agreement. Still the parties seem to have thought proper to have it witnessed, and we have been unable to find any authority which takes this particular character of instrument out of the operation of the rules above enunciated. If the witness could not be produced after diligent search, or was beyond the jurisdiction of the court, then the handwriting of said witness might have been proven. (1 Whart. Ev., sec. 726; Abbott's Trial Ev., 391.) Or if after its execution the defendant had admitted *aliunde* its execution, then that admission would have proven it. If the absent attesting witness cannot be produced or accounted for, and his handwriting cannot be proven, or if no independent admission of execution by the objecting party can be proven, we can see no reason why the fact of the execution might not

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be proven by any one who saw the parties sign and execute it. In secondary evidence there are no degrees, and we see no reason why this rule would not also allow such proof as that just mentioned. (*White v. Holliday*, 20 Texas, 679.) But some such proof must have been made before its introduction as evidence was admissible, where the objection to its introduction called its execution in question, as in this instance, and the court erred in its admission over the objection and without the necessary proof of execution. *Strippleman v. Clark*, 11 Texas, 296, is not analogous.

Again: the case as established by the proofs was one wholly of circumstantial evidence. Where such is the case the rule is imperative that, whether asked or not, the court should instruct the jury as to the law controlling that character of evidence. (13 Texas Ct. App., 51; *Id.*, 309; *Id.*, 493; *Id.*, 669; 14 Texas Ct. App., 96; *Id.*, 312, and authorities cited in those cases.)

For the errors discussed, the judgment is reversed and the cause remanded for a new trial.

*Reversed and remanded.*

Opinion delivered May 17, 1884.

[No. 3085.]

## J. H. BROWN AND OTHERS v. THE STATE

1. DEFACING PUBLIC BUILDINGS—INDICTMENT—CONSTRUCTION OF A TERM.—The indictment in this case charges as follows: "That J. H. Brown & C. C. Brown, J. A. True & J. H. True, late of the county of Young, on the fifteenth day of January, in the year of Our Lord one thousand eight hundred and eighty-three, with force and arms, in the county of Young, and State of Texas, did then and there wilfully injure and deface the school house known as the Flat Rock school house, said house being then and there a public school house, and was then and there held by said Young county as a public school house; against the peace and dignity of the State." *Held*, that the sign "&" as used between the two words "Brown," and the two words "True," is synonymous with the conjunctive word "and," and sufficient to the validity of an indictment, though the use of the written word "and" is the better practice.

16	245
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16	245
33	571

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2. **SAME.**—"PUBLIC BUILDINGS," as used in Article 417 of the Penal Code, are declared by Article 418 of the same Code to mean the "Capitol, and all other buildings in the Capitol grounds, at the seat of government, including the General Land Office and the Executive Mansion, the various State Asylums, and all buildings belonging to either; all college or university buildings erected by the State; all court houses and jails, and all other buildings held for public use by any department or branch of government, State, county or municipal; and the specific enumeration of the above shall not exclude other buildings not named, properly coming within the meaning and description of a public building." *Held*, that the indictment in this case is insufficient, inasmuch as where it is attempted to charge the injury or defacement of any other public building than those specifically enumerated in said Article 418 of the Penal Code, the indictment must allege that such building was a "public building," and was "held for public use." A private building might be a "public school house," and not within the purview of the statute.
3. **SAME.**—The word "wilful," when used in a penal statute, means with evil intent.
4. **SAME.**—**STATEMENT OF FACTS** filed after the adjournment of court, unless such filing is shown by the transcript to have been authorized by the court, will not be considered by this court for any purpose.

**APPEAL** from the District Court of Young. Tried below before the Hon. B. F. Williams.

The opinion discloses the case. A fine of thirty dollars was assessed against each of the appellants as punishment.

*C. W. Johnson* and *O. E. Finlay*, for the appellants.

*J. H. Burts*, Assistant Attorney General, for the State.

**WHITE, PRESIDING JUDGE.** The charge in the indictment upon which the appellants were tried and convicted was as follows, viz: "That J. H. Brown & C. C. Brown, J. A. True & J. H. True, late of the county of Young, on the fifteenth day of January, in the year of our Lord one thousand eight hundred and eighty-three, with force and arms, in the county of Young, and State of Texas, did then and there wilfully injure and deface the school house known as the Flat Rock school house, said house being then and there a public school house, and was then and there held by said Young county as a public school house; against the peace and dignity of the State."

This indictment was brought under the following articles of the Penal Code, viz:



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"Article 417. If any person shall wilfully injure or deface any public building in this State, he shall be fined not less than five nor more than five hundred dollars.

"Article 418. The term 'public building,' used in the preceding article, means the Capitol and all other buildings in the Capitol grounds at the seat of government, including the General Land Office and the executive mansion, the various State asylums and all buildings belonging to either; all college or university buildings erected by the State, all court houses and jails, and all other buildings held for public use by any department or branch of government, State, county or municipal; and the specific enumeration of the above shall not exclude other buildings not named, properly coming within the meaning and description of a public building."

A motion to quash the indictment assigned the following grounds:

"1. Because said indictment does not charge any offense known to the laws of Texas in the terms of the statute creating the same.

"2. Because said indictment does not charge that the defendants wilfully injured or defaced a 'public building' within this State."

"3. Because said indictment does not allege that Flat Rock school house was 'held for public use' by Young county.

"4. Because said indictment does not aver with sufficient certainty the name or names of the party or parties committing the offense, in this, that by the use of the commercial sign "&" it is left uncertain whether two or more firms or one or more individuals committed the offense.

"5. Because, by the omission of the conjunction "and" after C. C. Brown, the said indictment is too vague and uncertain in charging the names.

"6. That said indictment does not charge the offense with sufficient certainty to place these defendants upon their defense."

We will notice the fourth and fifth grounds first and together. It will be noticed that the pleader used between the names of the defendants the sign or abbreviation "&," instead of the conjunction or word "and." In the appendix to his unabridged dictionary, under the title "Miscellaneous," Mr. Webster makes the sign or abbreviation "&" mean the same as the word "and," and Mr. Richardson in his dictionary gives many illustrations from the old English authors under the word "and," showing

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that the sign "&" was used synonymously with "and" as an abbreviation for the word "and." This style of abbreviation has come down to us sanctioned by age and common use for perhaps centuries, and is used even at this day in written instruments, in daily transactions, with such frequency that it may be said to be a part of our language when it is written. The abbreviation "A. D." before the figures indicate with certainty the year or era to which they were intended to refer, as much so as the words "Anno Domini," or "of our Lord," and many other like instances are cited by Mr. Bishop. (1 Bish. Crim. Proc., 3 ed., chap. 22, secs. 340 to 355 inclusive, and notes.) But whilst we hold that the use of the abbreviation "&" between the names of defendants in an indictment does not import a partnership, and that it is equivalent to the word "and," we think the better practice in indictments is to write all the words in full, and especially so, as in this instance, where the full word would require but little more writing than the abbreviation.

Let us now consider the other objections to the indictment.

Where it is attempted to charge the injury or defacement of any other "public building" than those specially enumerated in Article 418, *supra*, the indictment must allege that the building was a "public building," and "held for public use" by the county. A house may be a "public school house" without being a public house "held for public use" by the State, county or town. A private individual may own a house, and yet use it as "a public school house," as that is for the use of the public generally who desire to patronize his school by sending pupils to it. The law evidently contemplated that the buildings intended to be protected should be "public buildings," owned, or controlled, and held by the public authorities for "public use." The indictment before us does not allege that the building charged to have been injured was "a public building," nor that it was held for "public use." These statutory words are essential to a description of the offense.

We cannot consider the statement of facts found in the record, because the court, it appears, adjourned on the twelfth of May, and the statement was not filed until the sixteenth, four days after, and no order allowing it to be made up and filed after adjournment appears in the transcript. If we could consider the statement of facts and charge of the court, it might present the additional question whether the offense is shown to have been committed *with evil intent*, which is the meaning of

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Statement of the case.

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the word "wilful" when used in a penal statute. (*Thomas v. The State*, 14 Texas Ct. App., 204.)

Because the indictment is not sufficient to charge the offense for which the conviction was had, the judgment is reversed and the prosecution dismissed.

*Reversed and dismissed.*

Opinion delivered May 17, 1884.

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[No. 3112.]

SANTIAGO SALTILLO v. THE STATE.

1. **THEFT - EVIDENCE—CASE STATED.**—In a prosecution for the theft of a mare, the defendant proposed to prove by a witness that at the time he, the defendant, returned on the morning that he went out to hunt his two horses, and after he returned to the K. ranch, he stated to the witness that he, defendant, had failed to find but one of his horses; that some person had taken his other horse, and that he found the mare in question with his horse that was not taken; that he intended to take the said mare to Uvalde and see if he could find her owner; that he supposed the person who took his missing horse left the mare with his other horse; that if he could find the mare's owner in Uvalde county he would deliver up the animal, and that he, the defendant, did not claim the mare. *Held*, that while not technically *res gestæ*, the proposed evidence was competent, not only to show the character of defendant's possession, but the defendant's intent in connection with his possession; wherefore the court erred in excluding the proposed evidence.
2. **SAME—DRIVING STOCK FROM ACCUSTOMED RANGE—FACT CASE.**—See evidence *held* insufficient to support a conviction either for theft of a horse, or for driving it from its accustomed range.
3. **SAME.—NEW TRIAL** should be awarded by the trial court when the evidence is clearly insufficient to support a conviction.

**APPEAL** from the District Court of Uvalde. Tried below before the Hon. T. M. Paschal.

The indictment charged the appellant with the theft of a horse, the property of W. M. Reynolds, in Uvalde county, Texas, on the fourteenth day of December, 1883. The conviction was for driving the animal from its accustomed range, with intent to de-

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fraud the owner. The punishment awarded by the jury was a term of two years in the penitentiary.

W. M. Reynolds was the first witness for the State. He testified that he knew and had known the defendant for a short time. Defendant lived in that part of the town of Uvalde known as Mexico. Some time in the month of January, 1884, the witness hopped and turned a certain mare out on his range, which extended from the town of Uvalde to Salt creek, a distance of about seven miles. On the morning following the evening on which the mare was turned out, the witness's son Lonnie, as usual, went out to drive her up. Failing to find her, after a search which was kept up until the morning of the third day after her disappearance, Lonnie returned home.

Acting on certain information he had received, the witness went to, and found his mare at, the defendant's house. He asked defendant what he was doing with the mare. Defendant replied that, two or three evenings before, he had hopped his two horses out on the range near Knox's ranch, seven miles northeast from Uvalde; that when he went to hunt them next day, he found but one of his horses, and the witness's mare with him; that he concluded some one had taken his other horse and left the mare; that he wanted to take the mare to Uvalde and find and deliver her to her owner if he could. He did not claim the mare, but delivered her to the witness on demand. The mare had been hard ridden, and was considerably used up. Defendant had no consent from the witness to take the mare. The mare was under witness's control.

Lonnie Reynolds testified, for the defense, that he was the son of W. M. Reynolds, the State's witness. He owned the mare in question. He turned her out on her range one evening, between Uvalde and Salt creek, and failed to find her as usual next day, but, within two or three days, found her at defendant's house, in that part of Uvalde known as Mexico. Defendant made to witness the same statement concerning his possession of the mare, and his intention with regard to her, as he subsequently made to W. M. Reynolds, as set forth in the latter's testimony. Defendant refused to deliver the mare to witness, who then went for his father, W. M. Reynolds, to whom defendant delivered her.

Lanatho Calsado testified, for the defense, that the defendant worked on Knox's ranch, in Uvalde county, but that his family lived in the town of Uvalde. At the time that he was employed

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on the Knox ranch, the defendant owned two horses, one a bay with white face, and one a sorrel. One evening in January, 1884, in the presence of the witness, the defendant hopped his two horses out near Knox's ranch. On the next morning, the defendant went out to hunt his two horses, and returned with but one of them and a black mare. At this point, the testimony referred to in the first head note of this report was offered, and excluded. The defendant had never recovered one of the horses he hopped out at Knox's ranch. At least, the witness had never seen that horse since he was turned out.

W. M. Reynolds testified, for the State, on being recalled, that he was the father and natural guardian of Lonnie Reynolds, who was but fifteen years old. He had control of both Lonnie Reynolds and the mare. The mare was both belled and hopped when she was turned out. She had on neither bell nor hopples when recovered.

The motion for new trial alleged error in the charge of the court and in the action of the court refusing charges asked, and denounced the verdict as too general, uncertain, and as unsupported by the evidence.

*G. W. Powell*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. As shown by defendant's third bill of exceptions, he proposed to prove by the witness Calsado "that, at the time said defendant returned on the morning that he went out to hunt his two horses, and after he, defendant, returned to the Knox ranch, that he stated to the witness that he had failed to find but one of his horses; that some person had taken the other horse of his, and that he found the mare in question with his other horse, and that he intended to take said mare to Uvalde and see if he could find an owner for her, as he supposed the person who took his horse which was taken left this mare with his, defendant's, horse which was not taken. That defendant further stated that if he could find an owner for said mare in Uvalde county, he would deliver said mare to such owner. That defendant did not claim to own said mare."

This proposed evidence was objected to by the counsel for the State, because it was irrelevant, and the objection was sustained by the court. In this ruling the court erred; the evidence was not irrelevant, but was pertinent to show not only the character

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of defendant's possession, but also his intent with regard to the possession. While perhaps not technically *res gestæ*, yet, when considered in the light of the evidence which was adduced on the trial, these delarations do not appear to be self-serving and inadmissible.

We are further of opinion that the evidence is insufficient to support a conviction for either theft or driving the animal from its accustomed range with intent to defraud the owner; of which latter offense defendant was convicted. There is no proof that defendant ever drove the animal from its accustomed range. When found by Lonnie Reynolds, the owner, in possession of the mare, it was in the town of Uvalde, in or near her range, where the owner had hobbled her out; and defendant stated to said witness that "he had brought the mare to Uvalde to find an owner for her, and in case he found an owner for said mare he would give her up."

In view of the insufficiency of the evidence, the court also erred in overruling defendant's motion for new trial.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 17, 1884.

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[No. 2955.]

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39	106

ABE WOODY v. THE STATE.

1. **LIBEL—INFORMATION.**—See the statement of the case for a newspaper article made the subject matter of a prosecution for libel, and *held* libelous *per se*; and for an information *held* sufficient to charge the circulation of a libel with intent to injure the reputation of the person libelled.
2. **SAME—EVIDENCE—FACT CASE.**—See evidence *held* sufficient to support a conviction for circulating a libel.

**APPEAL** from the County Court of Tarrant. Tried below before the Hon. R. E. Beckham, County Judge.

The conviction was for the malicious circulation of a libel, and the penalty imposed was a fine of two hundred and fifty dollars.

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Syllabus.

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The charging part of the information is as follows: "That one Abe Woody, in the county of Tarrant and State aforesaid, heretofore, on the fifth day of October, in the year of our Lord 1882, then and there being a person of an evil, wicked and malicious mind and disposition, and unlawfully, wickedly and maliciously devising, contriving and intending, as much as in him lay, to scandalize, villify and defame one George S. Burchill, and to bring him into public scandal, infamy and disgrace, and to injure, prejudice and disgrace and aggrieve him, the said George S. Burchill, then and there of his, the said Abe Woody's, malice, hatred and ill will towards said George S. Burchill, unlawfully, wilfully and maliciously, and with intent to injure him, said George S. Burchill, and with intent then and there to injure the reputation of said George S. Burchill, then and there did maliciously circulate and distribute in a certain newspaper entitled 'The Grand Army Journal,' certain false, scandalous and defamatory and malicious statements of and concerning said George S. Burchill, and then and there affecting the reputation of said George S. Burchill, conveying that said George S. Burchill had been guilty of the penal offense of theft and robbery, and that he, the said George S. Burchill, had been guilty of acts disgraceful to him as a member of society, the natural consequences of which being to bring him into contempt among all honorable persons; said Abe Woody then and there well knowing the contents of said libel so circulated and distributed by him as aforesaid, which said false, malicious, defamatory libel is in words and figures as follows, that is to say:

"Texas, ex-Governor Davis, and his pliant Burch, the indicted mail thief, who ought to have been sent to the penitentiary, but who escaped by victimizing his unsophisticated youthful fellow clerk. The scoundrel now in this city brazenly seeking to retain his wife in a Federal office in Texas, by defaming the character of certain Republican gentlemen of the highest standing and reputation. There is in this city (meaning the city of Washington, in the District of Columbia), from Fort Worth, Texas (meaning the city of Fort Worth, in the State of Texas), an individual (meaning the said George S. Burchill), who, although he claims to have served in the army of the Union, is nevertheless a disgrace to any decent community (meaning that said George S. Burchill is a disgrace to any decent community), and whose brazen impudence is equalled only by the infamy of his unpunished mail thefts while serving Uncle Sam in the capacity of clerk in a

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Texas post office. (Meaning thereby that said George S. Burchill had been guilty of theft from the United States mails.) We write this notice of the fellow (meaning said George S. Burchill) with a view to enlightening First Assistant P. M. General Hon. Frank Hatton (meaning the First Assistant Postmaster General of the United States), and the departments generally, upon the true status of this penitentiary-deserving mail robber of registered money packages. (Meaning thereby that said George S. Burchill had been guilty of the penal offense of robbing the United States mails of registered money packages, and that he deserved to be sent to the penitentiary therefor.) We are prompted by no animus in this matter other than a laudable desire to protect respectable and honorable persons from the base malignings of this indicted thief (meaning that said George S. Burchill had been guilty of the penal offense of theft), and to aid in his ejection from the Federal service. Since his advent in our city (meaning said city of Washington), he has been denouncing this journal as the hireling of certain gentlemen to fight that great political fraud, E. J. Davis, of Texas, and also falsely charging upon a certain well known and highly reputable old time stalwart member of the Republican party of that State, the authorship of our leading editorial of the sixteenth instant. Every word of the editorial referred to was written by the editor and publisher of this journal, A. T. Bissell, and the facts expressed therein were taken from the stores of his own personal knowledge, as a resident Republican citizen of Texas during the periods therein named. The editorial discussed facts which are notorious and of record, and it is therefore not at all improbable or unlikely that it resembles editorials of other newspapers that may have been written upon the same unsavory subject. He (meaning the said George S. Burchill), the mail thief, (meaning that the said George S. Burchill had been guilty of the penal offense of stealing from the United States mails), makes this charge, hoping thereby to fortify and render successful his brazen scheme to defeat the expressed wishes not only of the great majority of the Republicans of Northwest Texas, but also many of the substantial business men of Fort Worth, who are Democrats, and who have anxiously joined in the efforts to remove this scoundrel (meaning said George S. Burchill) from a Federal position wherein he has already robbed them (meaning thereby that said George S. Burchill had been guilty of the penal offense of robbery), and in his infamy by cajoling and pernicious



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influences escaped the penitentiary by inducing his unfortunate fellow clerk, a mere boy, of highly respectable family, to assume the guilt of the whole robbery. But for the court record of this villainous case here referred to, we have merely to cite to the criminal docket of the United States Court for the Northern District of Texas.'

"To the great damage, disgrace, scandal and infamy of him, said George S. Burchill, and against the peace and dignity of the State."

H. P. Shields was the first witness sworn for the State. He stated that he knew both the defendant and George S. Burchill, the prosecuting witness, and he knew them during the year 1882. Burchill was then, and is now, a clerk in the post office at Fort Worth. His wife, Belle M. Burchill, is now post mistress at Fort Worth, and was such post mistress in 1882, having succeeded J. P. Alexander in that position. Burchill was a post office clerk under Alexander while Alexander was post master. During Alexander's administration of the office, registered money packages were lost or stolen from the office, and George S. Burchill and one William Clegg, a nephew of post master Alexander, were arrested and charged with the theft. Clegg confessed that he perpetrated the robberies, and exonerated Burchill. Burchill is a Republican.

The paper containing the alleged libel was here exhibited to the witness. The paper was entitled "The Grand Army Journal," and purported to be published at Washington, D. C. Witness recognized the article alleged to be libelous. He first saw the said article in the year 1882, before the filing of the information in this case. Witness was walking up Main street, in the city of Fort Worth, and when near his place of business saw the defendant sitting on a beer keg reading a letter. As the witness started into his place of business, the defendant took a paper from his side pocket, unfolded it, and said: "Here is a bad piece on Burchill." The newspaper was the "Grand Army Journal," and the article to which witness's attention was called was the same contained in the paper now in evidence. Witness and defendant stepped back into the beer room, where they were joined by Colonel Morten, and one Dotson, colored. Some discussion of the article followed, witness defending Burchill and defendant talking against him. Witness did not remember the words used by defendant. Witness remarked that the matter had already been settled, and Burchill discharged, and that he thought it im-

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proper and not right to be recalling such charges against Burchill. Defendant replied that Burchill could be arrested again. Burchill and defendant were not on good terms. This all occurred in Fort Worth, Texas. The defendant was then, and still is, a deputy United States marshal.

Parson Dotson testified, for the State, substantially as Shields did. He stated that defendant was sitting on a beer keg reading the newspaper as he, witness, and Shields walked up, and, pointing the article out to Shields, remarked: "Here is a h—l of an article on Burchill."

Lon Stien, being shown the article, testified, for the State, that he had seen it before. Witness, on one occasion, was standing in his place of business, and saw the defendant and some man he did not know standing in the door, reading an article in a newspaper which seemed to reflect severely on Burchill. Witness asked to see the article, and defendant handed him the paper. The paper was the "Grand Army Journal." The witness read the article, which was the same as that in evidence.

George S. Burchill testified, for the State, that the post mistress, Belle M. Burchill, was his wife. Witness and defendant fell out about some mail robberies done three years before this trial, and were not on good terms.

George Davenport testified, for the State, that he saw the alleged libelous article before the information against the defendant was filed. Witness was at the Union depot in Fort Worth one evening, just after the train arrived. Defendant passed him with a roll of newspapers. Witness asked him for a paper, and defendant handed him one, saying something about it containing an article on Burchill. Witness opened the paper, and saw the article on which this prosecution is based. Witness did not know that any body on the train threw the paper to defendant. Witness had heard many persons discuss the article. At this point the State closed.

Colonel Morten was the first witness for the defense. He testified that, previous to and at the time of the arrest of the defendant, he, witness, was the editor of a Republican newspaper in the city of Fort Worth. Several copies of the "Grand Army Journal" came to the witness's office, some of which contained the alleged libelous article. As well as the witness could remember, a series of articles on the same subject were published. Defendant was in Fort Worth at the time. Witness heard a great deal of talk about the article at the time it appeared, but

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the paper containing it was not shown to the witness by the defendant. The paper was received through the mail by a great many parties. The several copies of "The Grand Army Journal" received by the witness were received at different times, as weekly exchanges. Witness did not know that more than one issue contained the libelous article in question.

R. W. McPhail testified, for the defense, that, prior to this information, he worked on Morten's Republican paper in Fort Worth. The first time he saw "The Grand Army Journal," containing the alleged libelous article, was some time before the information was filed. Several copies of that paper came to Morten's office from Washington, and were left on the table in Mr. Morten's office. Several articles were published in that paper, "The Grand Army Journal," relating to the arrest of Burchill and Clegg for robbing the mail, and Clegg's confession. Several copies of the paper containing the article were received in Fort Worth by mail, and occasioned much talk. Witness understood that Clegg confessed to the robberies for which he and Burchill were arrested, pleaded guilty, and was sentenced to the penitentiary for two years, but that he subsequently made another confession, or statement, implicating Burchill.

L. H. Hill, for the defense, testified, in substance, that he saw the article in question before the arrest of the defendant. Defendant did not show it to him. Witness received several of the papers from Washington through the mail, and knew of several other parties in Fort Worth who likewise received copies of the paper containing the said article.

The State then introduced "The Grand Army Journal" in evidence, and read the article to the jury, just as it appears in the information.

The question involved in the opinion were among those raised by the motion for new trial.

*Furman, Stedman & Capps*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. There can be no question as to the fact that the newspaper publication, which is the subject matter of the charge laid in the indictment, is libelous *per se*, and, in our opinion, the indictment is amply sufficient to charge the offense of libel.

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We are further of opinion that the evidence fully establishes the fact that defendant circulated the libel with malicious design, by reading and exhibiting it to others (Penal Code, Art. 621), and that he did so with intent to injure the reputation of Burchill, the libeled party. (Penal Code, Art. 616.)

We find no error in the proceedings and judgment of conviction in this case for which the judgment should be reversed, and it is therefore affirmed.

*Affirmed.*

Opinion delivered May 17, 1884.

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[No. 3084.]

WALTER KENNEDY v. THE STATE.

1. **THEFT—PRACTICE—CHARGE OF THE COURT—POSSESSION OF RECENTLY STOLEN PROPERTY.**—It is a well settled rule of practice that the charge of the court should submit the law affirmatively upon every legitimate phase in which the evidence might be considered by the jury, and upon all the issues raised by the proof. And when there is a doubt as to whether an issue is or is not directly made by the evidence, the better practice is to solve the doubt by charging the law with reference to it. But see a state of proof whereunder, in the absence of a requested charge, the omission of the court to charge the law applicable to the defendant's explanation of his possession of stolen property before it was questioned was not reversible error.
2. **SAME—CIRCUMSTANTIAL EVIDENCE.**—Omission to charge the law of circumstantial evidence, when the State relies alone upon that character of evidence, is fatal error.

**APPEAL** from the District Court of Mitchell. Tried below before the Hon. T. B. Wheeler.

The indictment charged the appellant with the theft of a coat of the value of twenty dollars, the property of W. H. Snyder, in Mitchell county, on the seventh day of December, 1883. The trial resulted in the conviction of the defendant, and the jury assessed his punishment at confinement in the penitentiary for the term of two years.

G. H. Colvin was the first witness for the State. He testified

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that he lived in the town of Colorado, Mitchell county, Texas. During the latter part of the year 1883, the witness was a clerk in the dry goods and clothing store of Snyder, Craig & Co., in Colorado, Texas. The firm of Snyder, Craig & Co. was composed of W. H. Snyder, B. F. Craig and T. E. McDevitt. Craig died in August or September, 1883, and the business was conducted by W. H. Snyder and T. E. McDevitt until January, 1884. One morning, early in December, 1883, the witness hung a number of articles of clothing in front of the store, as signs, among them a certain overcoat. The witness had no recollection of noticing that overcoat during the day, after he hung it out, nor did he miss it until after dark, when he went to take in the various articles hung out as signs. He then saw that the overcoat was gone. The witness had not sold it, and found upon inquiry that it had not been sold, and he immediately notified the sheriff that he thought the coat had been stolen. Several other persons were employed as clerks in the store at the time, and were authorized to sell that coat or any other goods in the store. Mr. Snyder and Mr. McDevitt were both in the store on that day. Mr. Robertson, the book keeper, and Messrs. Harper and Payne, both clerks, were in the store. Witness notified the sheriff of the loss about thirty minutes after he missed the coat. Mr. Parks, the deputy sheriff, brought the same coat back to the store. That coat was worth twenty dollars; was one of a lot of half a dozen held at that price, and of which three or four had been sold at that price. When taken, the coat had been in the house about two months.

The coat that was stolen had been hung out as a sign for several days, and it is possible that it might have caught a little dust, but its value was in no way impaired. The witness did not know who got the coat, nor at what time it was taken. It was a brownish colored wool or cashmere overcoat. It had not been materially injured when it was brought back. The price tag had been taken off, and the lining at the entrance of one sleeve had been ripped or torn a little. The goods belonging to Snyder, Craig & Co., were attached, and were sold under the attachment in bulk in January, 1884. The same stock of goods is now in the same house, and the witness was now engaged in selling them out. That coat, or another of the same lot, is now in the store. The coat described was taken in Mitchell county, Texas, by some one, without the knowledge or consent of the witness.

Harper and Payne, clerks, and Snyder and McDevitt, proprie-

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tors of the store, testified substantially to the same facts as those stated by the witness Colvin.

Wayne Parks testified, for the State, that he was deputy sheriff of Mitchell county in December, 1883. He was at that time acquainted with the prosecutors and the defendant. About dark one evening in December, 1883, the witness, having a claim against the defendant for a fine and costs, and hearing that he had packed his valise to leave on that night's train, went to the depot to intercept him. Not finding him at the depot, the witness went to a negro dance that was in progress near by, and found him. It was then seven or eight o'clock. Witness told defendant that he must pay up the fine and cost he was due before he left. He and the defendant were then out of doors, in front of the dance house. Defendant said that he would raise the money, which amounted to between six and ten dollars. He went into the room to see if he could get the money, and on his return presently, said that he had failed. Just then Mr. Hixon stepped up, and defendant proposed to sell Hixon a new overcoat that he was wearing for the money to pay the fine and costs. Hixon, defendant and witness examined the overcoat, and Hixon asked the witness if the coat was worth six dollars and a half. Witness replied that he thought it was. Defendant spoke up and said: "I know it is. I got it from Schwartz, Roas & Co., three or four days ago, and paid thirteen dollars and a half for it." Witness then went with Hixon and defendant to the depot, where Hixon gave the defendant six dollars and a half for the coat, which defendant paid over to the witness. Witness went on back toward the court house, and when he got to Snyder, Craig & Co.'s he heard them say that an overcoat had been stolen from them. Witness went directly back to the depot, arrested the defendant, and got the coat from Hixon. Snyder, Craig & Co. identified the coat and witness left it in the store that night. The defendant had an examining trial next day. Schwartz, Roas & Co., were merchandizing in Colorado at the time of the theft of the coat. Schwartz and Roas both had gone before this trial, and B. Hirsch was the only member of the firm of Schwartz, Roas & Co., residing in Colorado at the time of this trial. The witness did not know how the defendant came in possession of the coat.

An overcoat was exhibited on the trial, which was shown not to be the identical overcoat stolen, but to have belonged to the same lot. Several expert witnesses for the defense testified that

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the coat exhibited was not worth more than sixteen or seventeen dollars. Among those so testifying was B. Hirsh, a member of the firm of Schwartz, Roas & Co., who did business in Colorado at the time of the alleged theft. Hirsh testified that on the examining trial he was shown the coat that was stolen, and testified then that the coat was worth twenty dollars or more. He adhered to that testimony. The coat in evidence on the examining trial was superior to the one used in evidence on this trial, and was worth twenty dollars or more. The firm of Schwartz, Roas & Co. had no such coats in stock in December, 1883, and did not sell the defendant any such a coat.

The questions discussed in the opinion, and the sufficiency of the evidence to support the conviction, were the grounds assigned in the motion for new trial.

*Martin & Kennedy*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Under the peculiar circumstances shown by the evidence, we cannot say that it is reversible error that the court omitted, in the absence of a special requested instruction on the subject, to charge the jury with regard to the law applicable to the statement made by defendant before his right of possession of the coat was questioned, to the effect that he had purchased the same of the alleged owners. It is a rule well settled that the charge should submit the law affirmatively upon every legitimate phase in which the evidence might be considered by the jury, and upon all the issues raised by the proof. And when there is a doubt as to whether an issue is or is not directly made by the evidence, it would be the better practice to solve the doubt by charging the law with reference to it.

There is, however, an error of omission apparent in the charge in connection with the evidence, for which the case under the well settled rules of practice must be reversed. All the inculpatory facts proven made the case one of circumstantial evidence, notwithstanding the shortness of the time which elapsed from the theft and the discovery of the stolen property in defendant's possession. Possession of property recently stolen is but itself a circumstance conducing to establish guilt. We find in the charge no instruction to the jury with regard to the law of circumstantial testimony. This error of omission is fatal to the

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Statement of the case.

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conviction. (*Allen v. The State*, just decided, and authorities therein cited; *ante*, 237.)

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 17, 1884.

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[No. 3125.]

L. L. VIVIAN v. THE STATE.

1. **SCIRE FACIAS.**—BAIL BOND executed before indictment is not vitiated because it fails to name the precise offense of which the principal therein was subsequently indicted. It is sufficient if it name some offense against the laws of the State.
2. **SAME—THEFT** is *eo nomine* an offense against the laws of this State, and it includes the theft of certain animals. The bond in this case, executed before indictment, recited that the accused was charged with the theft of animals. It is urged that, in failing to specify the kind of animals stolen, the bond is not in compliance with the law. But it is *held* sufficient, under subdivision 3 of Article 283 of the Code of Criminal Procedure. See the opinion *in extenso* on the subject.
3. **SAME.**—BAIL BOND in stating the place where the accused is bound to appear is sufficient if it specify the name of the court or magistrate, and of the county. The bond in this case conditions that the accused "shall be and appear before the honorable District Court on the first day of the next term thereof, to be begun and holden at the court house in Carrizo Springs, in said county, on," etc. The bond nowhere recites the name of a county, but recites that the accused has been arrested by virtue of a warrant issued by "J. R. Sweeten, J. P. Pr. No. 1, D. C." *Held*, that this court is not authorized to presume that the initials "D. C." signify "Dimmit County," nor that "Carrizo Springs" are in Dimmit county. In this respect the bond fails to state the name of the county before the district court of which the accused was bound to appear, and for that reason the motion to set aside the judgment *must* should have prevailed.

ERROR from the District Court of Dimmit. Tried below before the Hon. D. P. Marr.

The writ of error in this case was prosecuted from judgment final on the forfeiture of the bail bond of J. B. Hopper, bailed under a warrant charging him with the offense of theft of ani-



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mals. One thousand dollars was the amount of the bond and the judgment.

*Ware & Lewis*, for the plaintiff in error.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** 1. The bail bond upon which the judgment appealed from is found describes the offense of which the principal therein was accused as the "theft of animals," without specifying the kind of animals. It is insisted that this is not a compliance with one of the essential requisites of a bail bond, which requires "that the offense of which the defendant is accused be distinctly named in the bond, and that it appear therefrom that he is accused of some offense against the laws of the State." (Code Crim. Proc., Art. 288, subdiv. 3.)

In this case the bail bond was executed *before* indictment found. In such case the rule is that the bond is not vitiated because it fails to name the precise offense of which the principal therein was subsequently indicted. It is sufficient if it name some offense against the law of the State. (*Barrera v. The State*, 32 Texas, 664; *Keppler v. The State*, 14 Texas Ct. App., 173.) Theft is an offense *eo nomine* against the law of this State, the offense being fully defined by name. (Penal Code, Art. 745.) It includes several *species*, to wit, theft from the person, theft of animals, theft which is a felony, and theft which is a misdemeanor. Whilst it is true that all animals are not the subject of theft, it is also true that the theft of certain animals is an offense against the law. Taking animals not the subject of theft would not be *theft of animals*, and those words cannot be used without naming an offense known to the law.

This case is not like the case of *Keppler v. The State*, 14 Texas Court of Appeals, 173, where it was held that the words "wilful burning" did not necessarily name an offense against the law. There might be a "wilful burning" which is not made an offense against the law. So there might be "malicious mischief" (*McLaren v. The State*, 3 Texas Ct. App., 680), or "gaming" (*State v. Cotton*, 6 Texas, 425), which would not come within the definition of any offense named in the Penal Code; but there could not be a *theft of animals*, or a *theft of anything else*, which would not be an offense against the law, for all *theft* is punishable under our law. It would have been sufficient

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if the bond had named the offense as *theft* without specifying "of animals." (*Montgomery v. The State*, 33 Texas, 179; *Turner v. The State*, 41 Texas, 549; *Lowrie v. The State*, 43 Texas, 602; *Gordon v. The State*, 41 Texas, 510.) We are clearly of the opinion that the bail bond in this respect is valid.

2. It is objected to the bail bond that it does not state the place where the accused binds himself to appear, and the court before which he was to appear. It is conditioned that the accused "shall be and appear before the honorable district court on the first day of the next term thereof, to be begun and holden at the court house in Carrizo Springs in *said county* on" etc. There is no *county* anywhere named in the bond. It is recited in the bond that the accused had been arrested by virtue of a warrant issued by "J. R. Sweeten, J. P. Pr. No. 1, D. C." But we cannot be permitted to conjecture and hold that the letters "D. C." signify Dimmit county. They might as well mean De Witt, Duval, Donley, or any other county having the letter "D" for its initial. Nor can we take judicial notice that "Carrizo Springs" are in Dimmit county. (*Hoffman v. The State*, 12 Texas Ct. App., 406; *Terrell v. The State*, 41 Texas, 463.)

In stating the place where the accused is bound to appear "it is sufficient to specify the name of the court or magistrate, *and of the county*." (Code Crim. Proc., Art. 288, subdiv. 5.) This bond states the name of the court, that is the district court, but does not state of what county, or in what county it is to be held, nor does it state any facts which show that the court intended ~~was~~ the district court of *Dimmit* county. If it had stated that the accused had been arrested by virtue of a warrant issued by J. R. Sweeten, a justice of the peace in and for the county of Dimmit, and had been held to bail by said justice, and had then been conditioned that the accused would appear before the district court, we would hold, as was held in *Hodges v. The State*, 20 Texas, 493, that it must be intended that it was the district court of the same county in which he had been so held to bail. But there is nothing in this bond from which we can conclude that the accused was bound to appear before the district court of Dimmit county; and this being the case, we are of the opinion that the bond is fatally defective, and that appellant's motion to set aside the judgment *nisi* should upon this ground have been sustained.

We find in the record the conclusions of the learned judge who tried this case upon the facts and the law, and we agree with

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him fully as to his conclusions of the law in so far as stated in the record. But it seems he overlooked the defect in the bond which we have just discussed. At least he does not mention it among the questions determined by him. This defect was made one of the grounds of appellant's motion to set aside the judgment *nisi*, and is, in our opinion, the only ground of his motion which is well taken.

Because the bail bond is insufficient in not stating the place where the accused bound himself to appear, and the court before which he was to appear, the judgment is reversed and this proceeding is dismissed.

*Reversed and dismissed.*

Opinion delivered May 21, 1884.

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[No. 2905.]

J. D. MARTIN AND H. H. NEILL v. THE STATE.

1. *SCIRE FACIAS*—PRACTICE—EVIDENCE—CASE STATED.—Under an indictment for theft, D. was convicted of swindling. Appealing to this court with appellants as sureties, he obligated himself, in his bond, to appear before the district court and abide the decision of his appeal. The conviction was affirmed on appeal, and D. failing to appear on his bond before the district court, the same was forfeited, and proper process to show cause, etc., was served on appellants. Appellants answered *scire facias* by general denial only, pleading none of the exonerating provisions of Article 453 of the Code of Criminal Procedure. The trial resulted in final judgment against appellants. On the trial, the State read in evidence the indictment against D. for theft, and, over objection, the judgment of conviction for swindling. The objection is, that the conviction was not supported by the indictment, but was for a different offense, wherefore the judgment was a nullity, and inadmissible in evidence. *Held*, that it was only necessary for the State to show the recognition and the judgment *nisi* declaring its forfeiture; that, while the judgment and indictment were not necessary evidence, their admission could in no way affect the issue in the case.
2. *SAME*.—The sufficiency of an indictment, or the regularity of the proceedings preliminary to the conviction of an offense charged by the indictment, cannot be questioned in a *scire facias* proceeding. In this case, the judgment of the Court of Appeals, affirming the judgment of conviction, was the law of the case, and could not be questioned in the court below. Nor can sureties on an appearance bond be heard in any way to question the guilt of their principal. See the opinion on the question.

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Opinion of the court.

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3. **SAME.**—Article 452 of the Code of Criminal Procedure prescribes the only causes which will exonerate principal and sureties from liability upon the forfeiture of a bail bond, and none of them reach to the sufficiency of the indictment or the validity of the conviction.
4. **SAME.**—**HABEAS CORPUS** may be invoked to escape the enforcement of a void conviction. But where a convicted defendant appeals, and he and his sureties obligate themselves to abide the judgment on appeal, they are bound by the obligation, whether the conviction was void or valid.
5. **RECOGNIZANCE—EVIDENCE.**—When offered in evidence, the recognizance was objected to, because it recited that D. had been convicted of swindling, for which offense he had not been indicted. For the reasons enumerated in the preceding head notes, the objection was properly overruled.

**APPEAL** from the District Court of Erath. Tried below before the Hon. T. L. Nugent.

This was an appeal from a judgment final upon the appeal bond of C. M. Davison, who, having been convicted of swindling under an indictment charging him with theft, and awarded punishment by fine of one hundred dollars and confinement for three months in the county jail, appealed to the Court of Appeals, where the judgment was affirmed. The amount of the bond and the judgment against appellants as sureties was two hundred dollars

*Lee Young*, for the appellants.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** C. M. Davison was convicted of *swindling* under an indictment charging him with *theft*. He appealed to the Court of Appeals, entering into recognizance, with appellants as his sureties, conditioned to appear before the district court of Erath county and abide the judgment of said Court of Appeals in said case. The Court of Appeals affirmed the judgment of conviction, and Davison failing to appear and abide said judgment, his recognizance was declared forfeited by the district court of Erath county, and appellants were duly cited to appear and show cause, etc.

Appellants answered the *scire facias* by a general denial only, not pleading any of the causes of exoneration prescribed by Article 452 of the Code of Criminal Procedure. A trial of the

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Opinion of the court.

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case resulted in a judgment final against appellants for the amount of the recognizance and costs.

Upon the trial the State read in evidence the indictment against Davison, charging him with *theft*. The State then read in evidence, over the objection of the appellants, the judgment of conviction under said indictment, for the offense of *swindling*. It is contended by appellants that the judgment of conviction was not supported by the indictment, but was for a different offense than that charged in the indictment, and was therefore a nullity and inadmissible in evidence.

It was not necessary for the State to read in evidence either the indictment or the judgment of conviction had under it. It was only necessary for the State to show the recognizance and the judgment *nisi* declaring the forfeiture of the same. (*McWhorter v. The State*, 14 Texas Ct. App., 240; *Arrington v. The State*, 13 Texas Ct. App., 554.) But, the State having read in evidence an indictment for *theft*, could it be permitted to show a conviction for *swindling* under said indictment? It is, we think, a sufficient reply to this question to say that the said judgment of conviction had been affirmed by this court, and that affirmance was the law of the case, and cannot be called in question in this proceeding by the appellants. It is well settled that the defendant and his sureties in a proceeding upon a forfeited bail bond or recognizance cannot be permitted to inquire into the validity of the indictment or the judgment of conviction, nor can the sureties be heard to question the guilt of their principal. (*The State v. Cocke*, 37 Texas, 155; *The State v. Rhodius*, Id., 165; *McCoy v. The State*, Id., 219; *The State v. Angell*, Id., 357; *The State v. Ake*, 41 Texas, 166; *The State v. Cox*, 25 Texas, 405; *Smalley v. The State*, 3 Texas Ct. App., 202.)

Our statute prescribes the only causes which will exonerate the defendant and his sureties from liability upon the forfeiture taken. (Code Crim. Proc., Art. 452.) None of these causes reach to the insufficiency of the indictment, or the invalidity of the conviction. If the recognizance is a valid and binding obligation in law, the obligors therein cannot be exonerated from liability for any cause not mentioned in the statute. Even if the defendant Davidson was erroneously convicted of *swindling* under an indictment for *theft*, this did not render invalid his recognizance given on appeal from such conviction. He was not compelled to appeal to rid himself of a void conviction, if it was void. He could have resorted, for relief, to the writ of *ha-*

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*beas corpus*. Having chosen the remedy by appeal, and, in order to avail himself of that remedy, having voluntarily obligated himself and his sureties that he would abide the judgment rendered upon his appeal, we think such obligation is valid and binding in law, whether the conviction was legal or illegal. But, as before said, the conviction in this case was held, on appeal, to be a legal and valid one, and that decision is an end of the matter so far as this proceeding is concerned.

While it was unnecessary for the State to read in evidence the indictment and judgment of conviction, their introduction did not, in our opinion, in any way affect the issues before the court, and could have no legal bearing upon the proper decision of those issues.

Appellants also objected to the recognizance, when offered in evidence by the State, because it recited that Davison stood charged with *theft*, and had been convicted of *swindling*, for which latter offense he had not been indicted. They assign as error the ruling of the court permitting the recognizance to be read over their objection. For the reasons we have already stated in this opinion, we hold that the objections to the recognizance were not tenable, and the court did not err in admitting it in evidence.

We find no error in the judgment, and it is therefore affirmed.

*Affirmed.*

Opinion delivered May 21, 1884.

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[No. 2953.]'

E. C. RAY v. THE STATE.

1. **SCIRE FACIAS—RECOGNIZANCE.**—One of the requisites of a recognizance is that it shall state the court before which, and the time and place when and where, the principal cognizor is bound to appear. The condition of the recognizance in this case is that the cognizor "shall well and truly make his personal appearance before the honorable district court of Parker county, Texas, now in session, at the court house thereof, in the town of Weatherford, and here remain from day to day," etc. *Held*, a full and explicit compliance with the statute.

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Opinion of the court.

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2. **SAME—PRACTICE.**—Article 452 of the Code of Criminal Procedure provides that “if a bail bond, or recognizance, be valid and binding as to the principal and one or more of the sureties, they shall not be exonerated from liability because of its being invalid and not binding as to another or other sureties.” Under this statute, judgment can be rendered in favor of one surety, and against the principal and another surety, if the facts so require. See this case in illustration.
3. **SAME.—SCIRE FACIAS**, as well as any other suit, may be dismissed as to one defendant and maintained as to another. Even where one surety has not been served, suit may be dismissed as to him and judgment taken against those served; and if judgment be taken against the surety not served, it may be dismissed as to him, even in the Appellate Court.
4. **SAME.—LIABILITY OF SURETY.**—A recognizance is not only a joint, but a joint and a several undertaking, and if good as to the principal and any one of the sureties, they are not only bound, but are liable, though another surety may not be.

**APPEAL** from the District Court of Parker. Tried below before the Hon. A. J. Hood.

The appeal in this case is from the forfeiture of the appearance bond of one John Campbell, bailed under a charge of cattle theft. The amount of the bond was five hundred dollars.

*McCall & McCall*, for appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WHITE, PRESIDING JUDGE.** One of the requisites of a recognizance is “that the time and place, when and where the defendant is bound to appear be stated, and the court before which he is bound to appear.” (Code Crim. Proc., Art. 289, subdiv. 4.) In this case the recognizance is conditioned that defendant “shall well and truly make his personal appearance before the honorable district court of Parker county, Texas, now in session, at the court house thereof, in the town of Weatherford, and here remain from day to day,” etc. This unquestionably stated, and as explicitly as it well could be stated, the time and place and when and where defendant should appear. There can be no doubt about the matter. The time and place were now and here, at this very time and at this very place, before the “district court of Parker county now in session in the town of Weatherford, wherein you, the cognizor, are entering into this very recognizance, and that you will *here* remain from day to day,” etc.

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Opinion of the court.

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If there is any possible chance for a mistake as to this matter we have been unable to see it. There is no similarity between this recognizance and those in the cases cited, viz., *Barnes v. The State*, 36 Texas, 332, and *Teel v. The State*, 3 Texas Court of Appeals, 326. The exception to the recognizance on this ground was properly overruled.

When the *scire facias* case was first tried, there was a judgment against all the parties, on the merits as to Hegan, one of the sureties, and by default as to appellant Ray. This judgment was set aside on motion of the defendant Hegan. At the next term Hegan filed a new answer, and on the second trial judgment was rendered by default against Ray and Campbell, but in favor of Hegan. These judgments were also set aside, and at the next term the prosecuting attorney suggested the death of Hegan, and dismissed the cause as to him. Appellant Ray filed a plea in abatement and in bar, to the effect that the judgment in favor of Hegan on the merits at the last term had never been set aside; that the action was joint and the judgment must be joint, or if there could be any judgment as to Ray it must be in a separate action. The court found against these pleas, and the action is assigned as error.

Because the recognizance is a joint obligation or undertaking is no reason why the judgment, as between the sureties, so far as the sureties are concerned, should be joint, and if it be admitted that the judgment in favor of Hegan and by default against Ray and Campbell, had never been set aside, the finding and judgment in behalf of Hegan would not and could not necessarily release or discharge appellant Ray, the other surety. A reference to the statute will fully dispose, we think, of the question. The Code of Criminal Procedure, Article 452, provides that if the bail bond or recognizance "be valid and binding as to the principal and one or more of the sureties, they shall not be exonerated from liability because of its being invalid and not binding as to another surety or sureties." Under this statute judgment can be rendered in favor of one surety and against the principal and another, if the facts so require.

But, as stated above, if the judgment was in favor of Hegan, it, as well as the judgment against appellant, was set aside. At the next term of court Hegan's death was suggested and the prosecution as to him dismissed. This could be done in *scire facias*, as well as in any other civil case. And even where one surety has not been served, it seems that suit may be dismissed as to



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him and judgment taken against those served, and if judgment be taken against the surety not served, it may be dismissed as to him, even in the Supreme Court. (*Goode v. The State*, 15 Texas, 124; *Sass v. The State*, 2 Texas Ct. App., 426; Clark's Crim. Law of Texas, p. 439, note 168.)

A recognizance is not a joint only, but a joint and a several undertaking, and if good as to the principal and any one of the sureties, they are not only bound but liable, though another surety may not be.

We find no reversible error in the record of the trial of this case and the judgment is affirmed.

*Affirmed.*

Opinion delivered May 21, 1884.

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[No. 3105.]

P. H. THRASH ET AL. v. THE STATE.

1. **RECOGNIZANCE—PRACTICE—PRESUMPTION.**—When a recognizance is taken in open court, it will be presumed that the penal sum named in the recognizance was the sum fixed by the court, whether such statement is explicitly made in the recognizance or not.
2. **SAME.**—**RECOGNIZANCE** recites that the offence charged in the indictment against the principal cognizor was "theft of bacon of the value of twenty-seven dollars." *Held*, sufficient to name an offense against the laws of this State.
3. **SAME.**—As to time and place of appearance, the condition of the recognizance is as follows: "Shall well and truly make his personal appearance before the honorable district court in and for Hood county, now in session, at the court house thereof, in the town of Granberry, and there remain from day to day," etc. *Held*, that the bond states fully the time and place, and the court before which the principal cognizor was bound to appear.
4. **SCIRE FACIAS.**—See the statement of the case for a *scire facias* held to be in substantial compliance with the rules by which the sufficiency of such writs are tested.

**APPEAL** from the District Court of Hood. Tried below before the Hon. T. L. Nugent.

The appeal in this case was from judgment final on the forfeit-

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ure of the recognizance of one Wick Casey, bailed under an indictment for the theft of property over the value of twenty dollars. Five hundred dollars was the amount of the recognizance and judgment.

The sufficiency of the *scire facias* is the subject matter of the last headnote of this report. It reads as follows:

“The State of Texas  
 “No. 46. vs. } *Sci. Fa.*  
 “P. H. Thrash & G. W. Casey. }

“The State of Texas to the Sheriff or any constable of Hood county, greeting:

“Whereas at the March term A. D., 1883, of the district court of Hood county, and on the twentieth day of March, A. D. 1883, a day of said term of said court, in a certain cause therein pending, wherein the State of Texas is plaintiff and Wick Casey defendant, against whom an indictment numbered 608 was then and is yet pending, as principal, and P. H. Thrash and G. W. Casey are his sureties on his recognizance given for the sum of five hundred dollars, the following order or judgment *nisi* was entered, in substance, to-wit:

““The State of Texas }  
 ““No. 608. v. }  
 ““Wick Casey. }

““This cause being called for trial, came the State by her attorney, but the said defendant, Wick Casey, failed to appear and answer in this behalf, and he and his sureties, P. H. Thrash and G. W. Casey, each being distinctly called three times at the court house door by the sheriff, still failed to appear and answer, but wholly made default, and it appearing to the court that the said defendant as principal, with P. H. Thrash and G. W. Casey as sureties, did enter into recognizance payable to the State of Texas, in the penal sum of five hundred dollars, payable jointly and severally, conditioned that the said principal should well and truly make his personal appearance before the honorable district court of Hood county, at the court house thereof in the town of Granberry, at the September term of this court, 1883, and there remain from day to day and from term to term of said court, until discharged by due course of law, then and there to answer the State of Texas upon a charge found upon a bill of indictment therein filed, wherein he is charged with theft of

## Opinion of the court.

bacon of the value of \$27.00. Whereupon it was ordered by the court that said recognizance be declared forfeited, and judgment *nisi* be entered against the said Wick Casey as principal and P. H. Thrash and G. W. Casey as sureties upon said recognizance for the sum of five hundred dollars, and that writs of *scire facias* do issue to each of said sureties, requiring them to appear at the September term, A. D. 1883, of said court, and show cause, if any they can, why said judgment *nisi* should not be made final.

“You are therefore commanded to summon the said P. H. Thrash and G. W. Casey to appear before the district court of Hood county aforesaid, at the court house in the town of Granberry, on the third Monday in September, 1883, then and there to show cause, if any they can, why said judgment shall not be made final, and execution had against them.

“Herein fail not, and due return make according to law.

“Test                      F. P. MORGAN,

“Clerk of the District Court of Hood county, and seal of the same, at Granberry, this twentieth day of April, 1883.

[L. S.]

“F. P. MORGAN,

“District Clerk.”

*Cooper & Estes*, for the appellants;

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. A motion to quash the recognizance was made by appellants and overruled, and, as we think, properly, by the court. Where a recognizance is taken in open court it will be presumed that the penal sum named in the recognizance was the sum fixed by the court, whether such statement is explicitly made or not in the recognizance itself. The offense charged in the indictment is named, and it fully appears that “theft of bacon of the value of twenty-seven dollars,” is an offense against the laws of this State.

As to the time and place of appearance, the condition is, “shall well and truly makes his personal appearance before the honorable district court in and for Hood county, now in session, at the court house thereof in the town of Granberry, and there remain from day to day,” etc. This fully states the time, place and court before which he was bound to appear. (See *Ray v. The State*, ante, 268.) *Barnes v. The State*, 36 Texas, 332, and *Williamson v. The State*, 12 Texas Court of Appeals, 169, are by

## Syllabus.

no means analogous to this case. All the requisites for a recognizance prescribed by the statute (Code Crim. Proc., Art. 287), are, in our opinion, fully complied with in the recognizance before us, and the court did not err in overruling the motion to quash.

We are further of opinion that the *scire facias* is in substantial compliance with the rules prescribed by which to test the sufficiency of such writs, and that the court did not err in so holding. (*Brown v. The State*, 43 Texas, 349; *Cowen v. The State*, 3 Texas Ct. App., 380; *Pearson v. The State*, 7 Texas Ct. App., 279.) It may be that the allegations are not shaped with that particularity and precision which would be demanded in a petition in a civil suit; still everything necessary to be stated, and which the State would have to prove, is substantially stated, and sufficiently so to apprise the defendant of what he is charged, and to put him upon notice of what would be proven.

We see no error for which the judgment should be reversed, and it is therefore affirmed.

*Affirmed*

Opinion delivered May 21, 1884.

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28	420

16	274
31	64

[No. 8086.]

J. F. COLLINS v. THE STATE.

1. PRACTICE—JUDGMENT—AMENDMENT.—A trial court has the authority to amend a judgment after the expiration of the term at which it was rendered, in order to correct clerical errors or mistakes, or to add an omitted clause necessary to give it effect, when there is anything in the judgment by which to amend. Under this rule, as laid down in this State and supported by elementary authority, the trial court, in a proceeding on a forfeited appeal bond, was authorized to amend the judgment *nisi* by inserting the omitted words, "the judgment will be made final unless good cause be shown at the next term of the court why the defendant did not appear." See the opinion *in extenso* on the subject.
2. SAME—NOTICE.—Articles 1854 and 1855 of the Revised Statutes require that notice be given to the parties interested in a judgment or decree before any correction of mistakes or misrecitals in the judgment can be made by amendment. Judgment *nisi* is the foundation of *scire facias* proceedings on a forfeited bail bond. To that judgment the principal in the bail bond is a direct party in interest, and, by reason thereof, becomes a necessary party to a proceeding to amend the judgment *nisi*, even though he was not made a party in the *scire facias*.

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Argument for the appellant.

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3. **BAIL BOND—PRACTICE—VARIANCE.**—Under the Revised Code, the generic term "horse" embraces all animals of the horse kind. The indictment charged the offense of stealing "one horse." The bond described the offense as the theft of "one sorrel mare." *Held*, that the descriptions were not variant.
4. **SAME—ALTERATION.**—In the original bond, sent up for inspection, the name of a surety had been erased by ink lines drawn across it, so as to obliterate it. It was objected, to the competency of the bond as evidence, that it first devolved upon the State to satisfactorily explain the erasure, and show that it was made under circumstances that did not affect the rights of the obligors. *Held*, that the objection was well taken.

APPEAL from the District Court of Callahan. Tried below before the Hon. T. B. Wheeler.

The opinion states the case. The amount of the bond adjudged was five hundred dollars.

*C. I. Evans*, for the appellant: 1. The court has no power, at a subsequent term, to correct a judicial error in a judgment rendered at a former term, and more especially after the lapse of three years after the rendition of the judgment. The original judgment *nisi* was rendered May, 1880, and did not state that it "would be made final, unless good cause be shown at the next term of the court why defendant did not appear." November 30, 1883, the district attorney filed a motion to amend by inserting these words, to which motion the court sustained appellant's exceptions and permitted the district attorney to amend his motion; and an amended motion containing these allegations was thereupon filed, seeking to correct the judgment *nisi* on the ground that the omission of these necessary words prescribed by the statute was a "clerical oversight on the part of the clerk of the court, for by law the entry of the judgment *nisi* forfeiting a bail bond is required to state the substance of the omitted sentence."

To this amended motion the appellant filed several exceptions, the first of which is on the ground that this amended motion is in the nature of a writ of error *coram nobis* for the correction of matters of fact in the judgment, while it appears from the face of the motion that the correction or amendment sought to be made is a matter of law; and this court has no jurisdiction to correct, at a subsequent term, the judicial errors of a former term.

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Argument for the appellant.

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This exception was overruled by the court and appellant excepted; and the first assignment of error brings in review this action of the court below. (Rev. Civ. Stat., Arts. 1354, 1355; *Perkins v. Dunlavy*, 3 Texas Law Rev., 177; *Lorance v. Marchbanks*, 2 Texas Law Rev. 44; *Camoran v. Thurmond*, 56 Texas, 22; *Russell v. Miller*, 40 Texas, 494; *Miller v. Richardson*, 38 Texas, 502; Freeman on Judgments, secs., 38-73.)

2. Every person interested in, or to be affected by a judgment, should have notice of a motion to amend it, filed either during or after the expiration of the term at which it was rendered. The provision of the statute, Code of Criminal Procedure, Article 442, relating to service of the *scire facias*, and providing that it need not be served on the defendant, cannot be extended by construction so as to include a motion to amend the judgment, or any other process than that mentioned.

The appellant accepted service of the motion to amend the judgment; E. Jackson, the other surety, was served; but there was no service on the principal in the bail bond, W. C. Tinker, and he had no notice of the motion. (Rev. Civ. Stats., 1354, 1355; *Williams v. Nolan*, 58 Texas, 708; *Coffee v. Black*, 50 Texas, 117; *Blalack v. The State*, 3 Texas Ct. App., 376; Freeman on Judgments, sec. 72.)

3. While it is true that a court has authority to amend a judgment after the expiration of the term at which it was rendered, in order to correct clerical mistakes or errors, or to add an omitted clause necessary to give it effect, when there is anything in the judgment by which to amend, yet it has no revisory or appellate powers over such judgments, and cannot, under the guise of an amendment, modify or enlarge a previous judgment so as to make it express something which the court did not pronounce, though it should clearly appear that it ought to have so decided. It is clerical, and not judicial errors, that may be corrected, and, to authorize such correction, it must be clearly shown that the court intended to, and did, pronounce a different judgment from the one entered up.

The State first introduced the bail bond; second, the indictment against Tinker, the principal in the bail bond; third, the judgment *nisi* entered May 7, 1880, Hon. T. L. Hutchison, judge, presiding; and, fourth and last, the docket entries from the judge's criminal docket of the court at the May term, 1880, as follows: "Bail bond forfeited; judgment *nisi* for the sum of \$500 against W. C. Tinker, as principal, and J. F. Collins and

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Argument for the appellant.

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E. Jackson, as sureties, and *scire facias* to sureties." This was all the evidence offered by the State to sustain the motion, and it was insufficient. No attempt whatever was made to prove that the proposed amendment was intended to have been inserted in the judgment and was omitted by mistake. (*Lorance v. Marchbanks*, 2 Texas Law Rev., 44; *Camoran v. Thurmond*, 56 Texas, 22; *Ximines v. Ximines*, 43 Texas, 458; *Miller v. Richardson*, 38 Texas, 502; Freeman on Judgments, sec. 70.)

4. It is not sufficient that a bail bond names some offense known to the laws of the State, but the offense named must be the very one with which the principal obligor stands charged. If it names a different one, the sureties may avail themselves of the variance. The indictment charges Tinker with "theft of one certain horse." The bail bond recites that he stands charged with the "theft of one sorrel mare." (*Smalley v. The State*, 3 Texas Ct. App., 202, and authorities there cited; *Brisco v. The State*, 4 Texas Ct. App., 222; Code Crim. Proc., Art. 288.)

5. The district court erred in overruling appellant's objection to the introduction of the bail bond in evidence, because it appeared from the face of said bail bond that a material alteration and erasure had been made therein, in this, that it appeared that the name of S. Young had been written or signed to said bond as one of the sureties thereto, and that said name had been erased by drawing ink lines across it, so as to obliterate said name; and because it was incumbent on the State to explain said alteration before said bail bond could be admitted in evidence, which was not done. If, on the production of a written instrument, it appears upon its face to have been materially altered, it is incumbent on the party offering it in evidence to explain and account for its appearance.

The original bail bond is sent up in the transcript by order of the court below, so that this court may inspect it. An inspection of it will show that there is such a material alteration on its face, the erasure of the name of one of the sureties, which required the appellee to explain its appearance, before it would be admitted in evidence. This point was reserved in bill of exceptions. (*Kiser et al. v. The State*, 13 Texas Ct. App., 201; *Heath v. The State*, 14 Texas Ct. App., 213; *Davis v. The State*, 5 Texas Ct. App., 48; *Park v. Glover*, 23 Texas, 471.)

J. H. Burts, Assistant Attorney General, for the State.

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Opinion of the court.

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WHITE, PRESIDING JUDGE. On a former appeal the judgment final in this case was reversed because the judgment *nisi* upon which it was based was invalid, in that it did not conform to the express requirements of the four hundred and forty-first Article of the Code of Criminal Procedure, regulating the requisites of such judgments. (*Collins v. The State*, 12 Texas Ct. App., 356.)

After the case was remanded from this to the district court for a new trial, the district attorney caused new citations to issue to the two sureties, service of which was had upon one, and service of the other was accepted by this appellant. Subsequently the district attorney filed a motion to amend the original judgment *nisi* by inserting the words prescribed in Article 441 Code of Criminal Procedure, which this court had held absolutely necessary to the validity of the judgment. Appellant accepted service of this motion, but no service of said motion was ever had upon the principal in the recognizance (Tinker).

To this motion appellant submitted the following exceptions, viz: "First, said motion is in the nature of a writ of error *coram nobis* for the correction of matters of fact in the judgment, while it appears from the face of said motion that the correction or amendment sought to be made is a matter of law, and this court has no jurisdiction to correct at a subsequent term the judicial errors of a former term, but the proper remedy for such a correction is in a revisory or appellate tribunal. Second, because said motion had not been served on W. C. Tinker, the principal obligor in the bail bond, and he had no notice of it; and, third, because the Court of Appeals, in the case of *Collins v. The State* (12 Texas Ct. App., 356), have decided that this very judgment *nisi* which the motion seeks to amend is invalid, null and void, and therefore there is now no such valid and legal judgment *nisi* in this case as this court can amend or correct."

These exceptions were overruled, and, after a hearing of the evidence on the motion, the same was sustained and granted, and the judgment *nisi* amended so as to conform to the requirements of the law.

In the errors complained of in this ruling, two questions arise: first, could the judgment *nisi* be amended as was done? and, second, if so, could such amendment be made without notice to Tinker, the principal obligor in the bail bond? As we understand the rule, it is that a court "has the authority to amend a judgment after the expiration of the term at which it was rendered, in order to correct clerical mistakes or errors, or to add an



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Opinion of the court.

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*omitted clause necessary to give it effect, when there is anything in the judgment by which to amend."* (*Lorance v. Marchbanks*, decided by the Supreme Court June 12, 1883, 2 vol. Texas Law Rev., p. 44, citing *Chambers v. Hodges*, 3 Texas, 517; *Trammell v. Trammell*, 25 Texas Supp., 261.)

"The rule," says Mr. Freeman, "that the record admits of no alteration after the term is obsolete. \* \* \* All courts have the inherent power to correct clerical errors at any time, and to make the judgment entry correspond with the judgment rendered. This power exists in criminal prosecutions as well as in civil cases." (Freeman on Judgments, 3 ed., sec. 71.) Again, the same author says: "Where there is nothing to show that the judgment entered is not the judgment ordered by the court, it cannot be amended. On the one hand, it is certain that the proceedings for the amendment of judgments ought never to be permitted to become revisory or appellate in their nature, ought never to be the means of modifying or enlarging the judgment or the judgment record, so that it shall express something which the court did not pronounce, even although the proposed amendment embraces matter which ought clearly to have been so pronounced. On the other hand, there are many cases in which it so clearly appears that the judgment as entered is not the sentence which the law ought to have pronounced upon the facts as established by the record, that the court acts upon the presumption that the error is a clerical misprision rather than a judicial blunder, and sets the judgment, or, rather, the judgment entry, right by an amendment *nunc pro tunc*." (Freeman on Judg., sec. 70.)

In the case under consideration, the object of the proceedings had was to forfeit the bail bond. How this is to be done is regulated by statute. All the proceedings appear to have been regular and in conformity with the statute, up to the clerical act of entering of the judgment *nisi*; and even that entry is correct, except that it omitted to recite that "the judgment" already rendered "will be made final unless good cause be shown at the next term of the court why the defendant did not appear." Without this recital, the judgment was imperfect and invalid in law. To amend the judgment by adding these words would not be revising the judgment; neither would it be enlarging the judgment so as to express something which the court did not pronounce. The amendment was clearly one which was necessary to give the judgment effect, and was simply to supply the omis-

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Opinion of the court.

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sion of a clause necessary to give it effect, and the judgment itself was sufficient, save this omitted clause; and this fact is manifest from an inspection of the judgment itself. The judgment, on its face, showed the omission, and, from an inspection of the judgment alone, the character of and the necessity for the amendment is apparent. The entry as made does not conform to what the court evidently intended it should be when it was ordered, and was therefore merely a *clerical error*, and amendable. (Freeman on Judg., sec. 72.) Under the rules above cited, we are of opinion the amendment was permissible and legally made.

Was Tinker, the principal obligor, entitled to notice of the proposed amendment before it could be acted upon by the court? It is a well established rule that "whenever an amendment of a judgment or decree is sought, notice should be given to the adverse party of the motion to amend. \* \* \* An exception to this rule may be allowed where the amendment is made from the record alone, and the judgment as proposed to be annulled is not different from what it would have been construed to be independent of the amendment. No one's rights are affected by it, as the effect of the record is not changed. All who may have consulted the record or acted upon the faith of it must be presumed to have notice of all which the proper construction of the whole record discloses; in other words, of the effect of the record." (Freeman on Judg., sec. 72a.)

Our statute requires that notice be given to the parties interested in a judgment or decree before any correction of mistakes or misrecitals in the judgment can be made by amendment. (Rev. Stats., Arts., 1354, 1355; *Williams v. Nolan*, 58 Texas, 708.) That is, all the parties interested in the proceedings resulting in the judgment, and who would be affected by the amendment, must have notice of the proposed amendment. (*Russell v. Miller*, 40 Texas, 494; *Blalack v. The State*, 13 Texas Ct. App., 376.)

Was the principal obligor interested and concerned in, and likely to be affected by, the amendment? As rendered, the judgment *nisi* was invalid because not in conformity to law. It was not a good or sufficient judgment, nor such an one as would uphold and sustain a judgment final on *scire facias* to the sureties. True, the principal is no party to the *scire facias* proceedings, because the sureties alone are cited and required to show cause, if any, "at the next term, why the defendant did not appear," and also, why the judgment *nisi* should not be

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Opinion of the court.

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made final. (Code Crim. Proc., Arts. 441, 442.) In these subsequent proceedings he has no direct interest, perhaps. But these whole proceedings are based upon the judgment *nisi*, which is a judgment in which he is a party directly at interest, because it is a declaration of forfeiture of his bond, and of the right of the State to claim the penalty of said bond as against him. As to him as well as the sureties, this declaration of forfeiture must be legal and valid in all respects, or the State cannot enforce it against him or them. The judgment must be good in law. If not good and sufficient in law, then any amendment or proposed amendment seeking to correct it and thereby make it valid, must necessarily affect him by making valid a judgment which theretofore was invalid against him. As to such a proposed amendment he is an interested and necessary party, and should have notice of it. This exception was well taken to the motion to amend, and it should have been sustained. These objections, however, might perhaps have been obviated by a new forfeiture instead of a motion to amend.

Two objections were urged to the bail bond when it was offered in evidence: 1. That there was a fatal variance between the offense charged in the indictment and that named in the bond, the former charging theft of "one certain horse," and the latter naming the offense as theft of "one sorrel mare." This objection would have been good under the law as it was before the adoption of the Revised Statutes, but under these statutes (Penal Code, Art. 746), the generic term "horse" embraces all animals of the horse species, and there was no variance in the descriptions in the indictment and bond.

2. Alteration in the bond. From the original bond, which is sent up as part of the record for our inspection, it appears that the name of "S. Young" had been written or signed as one of the sureties thereto, and that said name had been erased by ink lines drawn across so as to obliterate it. The objection was that the alteration was patent and material, and that it devolved upon the State to satisfactorily explain the erasure, and show that it was made under circumstances that did not affect the rights of the obligors, before said bond was admissible as evidence. This objection was well taken, and the court erred in overruling it. (*Kiser et al. v. The State*, 13 Texas Ct. App., 201; *Heath v. The State*, 14 Texas Ct. App., 213; *Davis v. The State*, 5 Texas Ct. App., 48.)

Several other errors are assigned, but we have pointed out

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Syllabus.

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those we deemed tenable; and because of the errors so pointed out, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 21, 1884.

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[No. 2987.]

W. J. KAIN v. THE STATE.

1. EXHIBITING A GAMING TABLE.—CONTINUOUS OFFENSES.—The exhibition of a gaming table, for the purpose of obtaining betters, which is the gist of the offense, is not an offense continuous in its nature, within the meaning of the law. See the opinion *in extenso* on the question.
2. PRACTICE—AUTREFOIS ACQUIT AND CONVICT—BURDEN OF PROOF.—When a defendant interposes the plea of *autrefois acquit* or *convict*, the burden of proving the identity of himself as the party formerly acquitted or convicted and the identity of the offense, is upon him; and the State can under no circumstances be required to establish the contrary.
3. SAME.—PROOF OF IDENTITY OF THE OFFENSE is not made by proof that the offense of which the defendant has been acquitted or convicted, and that for which he is on trial, are identical in nature, name and designation; but it must be made by showing the identity of the very acts or omissions which constituted the offense—that the acts which constituted the offense for which the former acquittal or conviction was had are the very acts which constitute the offense on trial.
4. SAME.—It has been stated as a rule that “the burden of proving a prior conviction of the offense charged against a defendant being upon him, it is not shifted by *prima facie* evidence of the identity of the offense of which he has been previously convicted with that charged upon him.” This rule, without modification, does not hold good in this State; for if the evidence makes a *prima facie* case in support of the plea, it must preponderate in its favor, and a preponderance of proof will suffice to support the plea.
5. SAME—CASE STATED.—The information in this case charges the appellant with *keeping* the gaming table as well as *exhibiting* the gaming table. The verdict and judgment fall to show for which (the keeping or the exhibiting of the same) the appellant was convicted, and it is therefore urged by appellant that he is relieved from the burden of proving the identity of the offense. *Held*, that the proposition is untenable; that, though it be conceded that the keeping of a gaming table is an offense continuous in its nature, the exhibition of a gaming table is not; and, to be available, the evidence in support of the plea of former acquittal or conviction must meet the whole case, and is not sufficient if it leaves it in doubt whether the former conviction was had for the keeping or the exhibition of the table.

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Statement of the case.

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1. **SAME—JURISDICTION.**—In opposition to the plea of former conviction in this case, it is urged by the State that, it being shown that the information in this case was pending in the county court at the time that a similar complaint was filed in the mayor's court (a court clothed with concurrent jurisdiction), even though the proof were sufficient to establish the identity of the offense, the plea could not prevail, inasmuch as, under the circumstances, the mayor's court could not have acquired legal jurisdiction. *Held*, that the position is not tenable, and that, if the proof was sufficient to establish that the offense tried by the mayor's court was identical with the offense being tried by the county court, the plea of former conviction would prevail in bar of a prosecution in the county court. See the opinion on the question.
2. **SAME—PRIVILEGE OF WITNESS.**—Article 307 of the Penal Code provides that "any court or officer having jurisdiction of the offenses enumerated in this chapter, or any district or county attorney, may subpoena persons and compel their attendance as witnesses. Any person so summoned and examined shall not be liable to prosecution for any violation of said articles about which he may testify." *Held*, that this privilege, which is extended to the witness merely to exempt him from prosecution under evidence which he might give criminating himself, is limited to the identical acts about which he testified, and to that extent will protect him; but it cannot be extended to any broader protection than that of which he has been deprived. Inasmuch as the record in this case fails to disclose that the defendant testified about the particular transaction for which he was on trial, his plea of privilege cannot avail him.
3. **SAME—FACT CASE.**—See evidence *held* insufficient to support special pleas of former acquittal, former conviction and privilege.

**APPEAL** from the County Court of Dallas. Tried below before the Hon. R. E. Burke, County Judge.

The information in this case charged that the appellant kept and exhibited, and was interested in keeping and exhibiting, a keno table, in the city of Dallas, Texas, on the fourth day of September, 1883. The trial of the appellant resulted in his conviction, and his punishment was affixed at a fine of twenty-five dollars.

The State introduced Dick Nelms, who, being sworn, deposed that he was a professional gambler, and, in August, 1883, resided in the city and county of Dallas, Texas. The witness, at that time, was at work exhibiting a keno game for the defendant, William J. Kain. He exhibited a keno game for the said William J. Kain, in Dallas, on the night of September 4, 1883. The witness was hired by the said Kain to exhibit, or help exhibit, the game of keno. Persons bet on that game of keno on the night of September 4, 1883. The game of keno is

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played with cards, balls, a globe, buttons, pegs, a pegging board and tables. The game exhibited by the witness for the said William J. Kain was the ordinary keno game, played on tables. It required from one to five minutes to play a game of keno. The game exhibited by the witness for defendant was kept open as long as the hall in which it was played was kept open. The hall was opened every night at about seven o'clock, and was kept open until twelve, one or two o'clock. It was so opened and kept open on the night of September 4, 1883. The State rested.

The defense first introduced city clerk John Carter, who testified that, on September 6, 1883, the defendant, William J. Kain, was tried and convicted in the mayor's court of the city of Dallas, upon a complaint which charged him with keeping and exhibiting, for the purpose of gaming, from the fifth day of March, 1883, to the fifth day of September, 1883, certain tables, including keno tables. Witness exhibited the complaint and judgment. On a similar complaint (which complaint and judgment were exhibited in evidence), covering the period from March 31, 1883, to October 26, 1883, the defendant was tried in the mayor's court of the city of Dallas, on the twenty-ninth day of October, 1883, and was convicted. On the same dates, September 6 and October 29, the defendant was fined in the said mayor's court on complaints for gaming.

The defendant was subpoenaed as a witness for the city of Dallas against Ed. Hennessey, Abe Sheppard, Jim Cornwall, Pat. Wilkerson, Dan. Stewart, Charles Mathews, Joe Orifice, Newt. Lacey, Dick Nelms, Tully Williams and Hugh McGin. The witness issued the subpoenas as city clerk. The names were given to the witness either by the city marshal or by some one of the policemen. Neither Mr. Cowart nor the defendant furnished witness the names. W. H. Johnson, Mr. Fields's assistant, represented the city on the sixth day of September. On the twenty-ninth day of October the defendant was subpoenaed by the city in the case against Ed. Hennessey, and was placed upon the stand by the city attorney, and questioned by him on behalf of the city. The ordinance of the city of Dallas against keeping and exhibiting gaming tables was passed July 10, 1883, was duly published, and went into effect ten days after publication.

It was agreed by the State and the defendant that the city ordinance against keeping and exhibiting, and being interested in

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Statement of the case.

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keeping and exhibiting, gaming tables is the same as chapter three, title eleven of the Penal Code of the State, except that the penalty attached to the offense in the city is free of costs, the fine being twenty-five dollars in both city and State as a minimum, and one hundred dollars maximum, with thirty days imprisonment allowed—the same period as that provided for by the State law—the ordinance of course being confined to the limits of the city of Dallas. The incorporation of the city of Dallas was also admitted. The amended charter of Dallas, passed March 31, 1883, and all ordinances enacted thereunder, were admitted to be in evidence.

The defense then read in evidence sections twenty-one, sixty-two and eighty-two of the said amended charter of the city of Dallas. It was then admitted that the defendant was the same W. J. Kain who was tried and convicted in the mayor's court on September 6, 1883, and October 29, 1883.

R. E. Cowart was then called to the witness stand by the defense. He testified that he was counsel for the defendant, and represented him on the trials in the mayor's court, on the sixth day of September and on the twenty-ninth day of October, on the complaints exhibited in evidence by the witness Carter.

The defendant Kain testified both on the sixth day of September, and on the twenty-ninth day of October, 1883, on behalf of the city in prosecutions against other parties. On the sixth day of September he testified against Ed. Hennessey in the mayor's court, on a complaint which charged the said Hennessey with exhibiting the game of keno in the city of Dallas, during the period between the fifth day of May up to and including the fifth day of September, 1883. On that trial the defendant was asked by the county attorney if Hennessey exhibited the game of keno between the dates mentioned and as mentioned in the complaint, and the defendant, as witness on that trial, replied: "Yes." The witness, as Hennessey's attorney, asked him if the game of keno was exhibited every night in Dallas, from May 5, 1883, to September 6, 1883, inclusive, and also on the twenty-sixth day of October, 1883, and he replied: "Yes, every night except Sunday nights." The defendant also testified that he had an interest in the game on those dates. In January, 1883, just before the Legislature was called upon to amend the charter of the city of Dallas, the gamblers of Dallas offered the witness twelve hundred and fifty dollars to have the charter so amended as to transfer to the city of Dallas sole and exclusive jurisdiction over

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Statement of the case.

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gambling cases arising in that city. The gamblers failed to raise the full amount of the fee and the matter was dropped, and another party went to Austin and worked to secure to the city jurisdiction in gambling cases. After the amendment of the city charter, it became a question as to how far a prosecution in the mayor's court would operate as a bar to a prosecution in the State court, and the witness had this fact in his mind when he defended the gaming cases in the mayor's court on the October trials. On those trials the witness asked all questions save those asked by the prosecuting attorney, and pursued such course as he thought would aid his clients in their contest in the county court, which he and his clients then knew to be pending. The defense closed.

Deputy county clerk Hughes, for the State, in rebuttal, testified that one hundred and nineteen cases were pending against the defendant for violations of the gaming laws. Sixteen of this number of complaints were filed September 5, 1883, the remaining one hundred and three between September 14 and October 15, 1883. Capiases on the complaints filed September 5 were issued the same day, and capiases on the complaints filed after that were issued between September 14 and October 15, 1883. At the request of the city attorney, whose object was to suppress from the gamblers, for the time being, all knowledge of the filing of the complaints, the witness, on the fifth day of September, took the complaints, including the sixteen against the defendant, above mentioned, to the county attorney's office, where, closing the door, he proceeded to issue capiases on them. While at work, filing the complaints, in the county attorney's office, in the manner and on the day stated, Mr. R. E. Cowart, the defendant's attorney, came into that office, walked up to the desk where the witness had the complaints and capiases before him, and looked over his, witness's, shoulders, where he remained a few minutes and then retired. Mr. Cowart did not ask for anything, nor did he say that he wanted anything. Witness informed the county attorney of this occurrence, and hurried up the issuance of the capiases, and placed them in the hands of the sheriff. The witness did not know whether or not Mr. Cowart saw or knew what he was doing. Defendant was arrested on those cases on the next day, September 6, 1883.

The first batch of complaints for gambling filed against Pat. Wilkinson were filed on the eleventh day of September, 1883. A large number of complaints for gambling against professional



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Statement of the case.

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gamblers, outside of Pat. Wilkinson's house, were filed in the county court on the fifth day of September, 1883. The lowest penalty assessable in the county court for exhibiting a keno table is a twenty-five dollar fine, and the lowest costs under a plea of guilty is twenty-seven dollars and forty cents.

The State then introduced the informations, indictments and capiases against the defendant, numbering one hundred and nineteen; also informations and judgments of conviction and acquittal in cases numbers 4026, 4027 and 4028, in the county court. No. 4026, on which defendant was convicted, charged the offense of exhibiting a keno table on the twenty-seventh day of August, 1883. No. 4027, in which the defendant was also convicted, charged the same offense on the twenty-eighth day of August, 1883. No. 4029, in which defendant was acquitted, charged that the defendant, on the first day of September, 1883, kept and exhibited and was interested in keeping and exhibiting a certain gaming table and gaming bank.

Ed. Cornwall was the next witness for the State. He testified that he was deputy city marshal of Dallas. At the city hall, after supper, on the night of September 5, 1883, the witness assisted city marshal Arnold to make out complaints against all of the gamblers in Dallas. Marshal Arnold and witness wrote the complaints, and policeman Pat. Mullen signed them. Mullen, on the same night, took them up to the residence of General W. L. Cabell, mayor of Dallas, and made the necessary affidavit to each complaint. Warrants were then issued on each, sent to Mayor Cabell for signature, and delivered to the police for service. The defendant was one of a number of gamblers arrested that night, the various warrants being served between nine and twelve o'clock. Never before during the witness's service as deputy marshal had warrants against the gamblers been made out or served at night. The practice prior to September 5, 1883, had been not to arrest them at all, but simply file the affidavits against them, notify them that they had been fined, name the amount and collect the fine. Neither the city attorney nor his assistant had anything to do with filing the complaints on September 5, 1883. Neither of them were present, and if they knew anything about the proceedings on that night witness was not aware of it. Thirteen witnesses, all professional gamblers, were subpoenaed by the defendant Kain as witnesses. As many as eight were put on the stand and testified against him.

Among the professional gamblers who testified in the October

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Statement of the case.

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trial were A. W. Campbell, Pat. Wilkinson, Charles Mathews and Dan. Stuart. Mathews and Stuart both run faro banks near the defendant's gambling house. Campbell was not in Dallas during the spring and summer of 1883, but was off attending races in other States. The gambling houses in Dallas were closed about October 10, 1883, and have never been opened since, except for a short time on the night of October 26, 1883, for which arrests were made next morning. The only times the gamblers were arrested under the amended charter for plying their trade was on September 5 and October 26, 1883. Witness had never known the gamblers to contest their prosecutions, except in the September and October cases. The cases named were tried on those days without the intervention of a jury, and were submitted without argument. Mr. Field or Mr. Johnson, counsel for the city, would ask each witness a few questions for the city, and Mr. Cowart a few for the defendants, and upon the evidence thus elicited the cases were submitted. The various witnesses were subpoenaed by policemen. So far as witness knew, neither Kain nor his counsel had anything to do with filing the complaints nor having witnesses subpoenaed. Witness did not know whether the policemen obtained the names of the witnesses from the city or the defendant. All the papers in the cases were written by the policemen, except the subpoenas, which were written by the city clerk. The affidavits and warrants were written by witness and Arnold, from an old form for keeping disorderly houses. The parties who appeared as witnesses never claimed their attendance fees, nor were such fees taxed against the defendants in any of the cases. Prior to September, 1883, the gamblers had never been prosecuted in the early part of the month. Nor were they ever prosecuted for keeping or exhibiting gaming devices, but only for betting.

City attorney Frank Field was introduced by the defendant in rebuttal. He testified that he left Dallas for Wisconsin on the eighth day of August, 1883, and returned on September 12, 1883. Prior to his departure the witness had not drawn any complaints against the gamblers for exhibiting gaming. He had drawn some for keeping disorderly houses. A great deal of discussion as to the city's jurisdiction over gambling cases followed the adoption of the amended charter. Opinion varied as to whether the jurisdiction conferred by the amendment was concurrent or limited. The gamblers were first arrested under the amended charter on the fifth day of September, 1883. They

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Statement of the case.

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were arrested the second and last time on the twenty-seventh of October, 1883. The witness had nothing to do with the September cases, but wrote up some of the October cases. Mr. Johnson, witness's partner, wrote the October complaints. Witness was present at the trials on October 29, 1883, and examined the witnesses, all of whom were professional gamblers, and prosecutions against each of them were pending at the time. None of them refused or declined to testify, and they were present when called. None of them, on trial, claimed the privilege of exemption because of having testified. All of them were prosecuted on complaints similar to those against Kain, and they testified against each other with reference to the same game; for instance, Jim Cornwall, Abe Sheppard and Fred. White were each charged with exhibiting faro in Kain & Campbell's faro hall. Cornwall and Sheppard testified in the cases as to the commission of the offenses charged in each case, during the period from March 31 to October 26, 1883. Witness examined as many as eight witnesses in each case. Witness had nothing to do with having the witnesses subpoenaed. The leading gamblers of the city were put on the stand and asked by witness if the defendant in the particular case on trial exhibited the particular game or games named in the complaint, during the time named. After such questions were answered, the witness turned the several witnesses over to Mr. Cowart, who was the counsel for all of the defendants in all of the cases. Cowart would ask each witness in each case if it was not a fact that the party charged did not run the game he was being prosecuted for, every night during the time included in the complaints, except Sunday night, and in each case they answered: "Yes." The gambling cases were all tried before the mayor without the intervention of a jury. Defendant's counsel did not, at any time during the progress of the trials, make an argument either on law or fact. He made no motions, and offered no pleas other than "not guilty."

Charles Mathews was the next witness offered in rebuttal by the defendant. He testified that he was a professional gambler in September and October, 1883, and run a faro bank about two blocks and a half distant from Kain & Campbell's gambling hall. The witness was present at his place, exhibiting his game every night with few exceptions during the spring, summer and fall of 1883, up to about the tenth day of October of that year. Gambling in the city of Dallas had been suspended since the

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tenth day of October, 1883, except for a short time on the night of October 26. The gamblers, the defendant and witness among the number, were before the mayor's court of the city of Dallas on the sixth of September and the twenty-ninth of October, 1883, charged with keeping and exhibiting, and being interested in keeping and exhibiting various gambling devices. All the gamblers were tried, and they were used as witnesses against each other. None but gamblers were used as witnesses in any of the cases, and in some instances, on September 5, as many as eight were put on the stand against a single defendant. Dan Stewart and witness, amongst others, were used as witnesses against the defendant Kain. Witness had frequently played keno in Kain's house. Kain was a witness against the witness on his trial, and testified that he was in witness's house only on one or two occasions, and that he had never seen the witness throw a card. Witness testified in the Kain case that he had been in Kain's house several times, but had never seen Kain throw a card, though he had seen the game of keno played there, and knew by general reputation that Kain kept the house.

All the gambling houses in Dallas were opened under a preconcerted understanding on the night of October 26, 1883. The gamblers were arrested next morning, and were tried in the mayor's court on the twenty-ninth of the same month. The reason that the houses were never opened again was that the sheriff told the gamblers that he was tired of serving so many papers, and that, if the houses were opened again, he would send spotters to the banks and prosecute all who bet or played. When they closed on October 10, 1883, the gamblers knew that if they opened again all the players would be prosecuted. They had such notice from various official sources. They had more numerous notices to that effect prior to the twenty-sixth of October than afterward. Public notices, headed "Fair Warning," were published in the city papers, and were posted throughout the city on or about October 1, 1883.

The gamblers had their reason for reopening after closing on the tenth of October. When they closed on that date, they did so with the *bona fide* intention of not opening again if the authorities would stop their prosecution, or, as they esteemed it, their persecution. But the complaints still continued to "roll in." The sheriff would tell them that he was very tired of serving papers in these cases, but that there were plenty more to be served—a whole basket full. Witness, for one, would ask, with

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Statement of the case.

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each new service, "Is this all?" and would get the invariable answer: "I don't know how many more they have got." Accordingly, the gamblers, concluding that they might as well be hung for a sheep as for a lamb, opened, hoping to make some money while they could. This hope, so far as the witness was concerned, was disappointed. He lost two hundred dollars. On the next morning, Kain, or some one from his house, told witness that the sheriff came to Kain's house and told him that he would be forced to close up the gambling houses, and, through spotters, prosecute the players. Thereupon the witness quit. When the gambling business has to encounter persistent prosecution, it is not profitable.

H. Lewis was the next witness to take the stand. Questions were propounded and answers given as follows:

"Do you remember a night in October when these gambling houses opened?"

"Yes, sir, I know."

"You heard they opened?"

"I heard they had opened."

"Didn't you go and see Kain and Campbell?"

"I saw Mr. Kain."

"What did you tell him?"

"I told him not to open that night; told him the sheriff was away."

"Didn't you tell him that the players had been spotted?"

"I don't recollect. I told him that there was a good deal of fuss kicked up about it, and that I was not the sheriff, and didn't want to take any action about it."

"They had already opened that night?"

"Oh, no; that was before. At that time they had not opened, or, if so, I didn't know it."

"That is the next night, I guess?"

"I understood they opened the night before. I don't know whether they had or not."

"Do you know whether they did open that night after you told them not to?"

"I could not say whether they did or not."

"You heard they had opened, and told Mr. Kain?"

"I am certain they did not open that night."

By the county attorney: "They had opened the night before?"

"That is what I understood. I don't know that."

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Statement of the case.

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"They have never opened since that?"

"If they have, I don't know it.

"Didn't they (the officers) arrest him every day or two, until they had as many as a hundred cases against Kain?"

"I don't know. I know he was arrested in a great many cases."

R. E. Cowart testified, for the defendant, in rebuttal, that he had no recollection of being in county attorney Clint's office at the time mentioned by Hughes. He did know that, if he was there, he did not know or learn what was being done by Hughes. Knowing nothing about it, he never told Kain, or any one else, anything about it. The witness had no hand in instigating the prosecutions in the mayor's court against Kain, or any other gambler. Witness was employed to defend the gamblers in the trials before the mayor's court, and knew that when the city put Kain on the stand, and he testified against Hennessey, that such proceeding would operate as a bar to any further prosecution, and had that fact in view on the trial had on October 29, 1883. Witness did nothing and said nothing to bring about the arrest and trial of any of the gamblers before the mayor's court, or to procure the testimony of any one against the other. Witness interposed the plea of "not guilty" on those trials. On the trial of Hennessey, Kain testified that Hennessey exhibited a keno table from the thirty-first of March to the twenty-sixth of October, inclusive. The witness represented Kain on his trials in the mayor's court, both on September 6 and October 29, 1883. The city introduced its witnesses, and asked them about each offense named in the complaints on both dates. These witnesses were called by the city, and were placed upon the stand by the city. When the city attorney finished with them, witness interrogated each witness, and covered all the time mentioned in the complaints. Witness then thought that the testimony of the defendant would operate to exempt him from further prosecution under his privilege.

Sheriff Smith was the last witness introduced. He testified that in July, 1883, the gamblers of Dallas told him that they were being too persistently prosecuted, and that if they were to be closed up they wanted to know it. From November, 1882, to July, 1883, the gamblers had paid in fines a larger amount of money than they had paid during the four years preceding. Witness did not then tell them they would be closed up. A short time after the election the county attorney asked witness to join

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Argument for the appellant.

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him in closing up the gambling houses. Witness told him that he had just been inducted into office, and had not fairly got to work, and for that reason could not help him then. He spoke to witness about it several times. The county attorney also went before the grand jury and got them to petition the county commissioners to give him detectives or special police to close up and suppress gambling. He made the same request of the commissioners in person. The commissioners decided that they had not that power. The county attorney then got the witness to specially deputize two men to be paid by him, the county attorney. Witness deputized the two men provided by the county attorney, but declined to embark in the business himself, or to control his regular deputies in the matter. After the detectives were put on in August, no further compromise was made with the gamblers.

The errors alleged in the motion for new trial were that the verdict was contrary to the law and the evidence; that the court erred in its charge to the jury; that it erred in refusing special instructions asked, and that there was error in the verdict, because the jury did not find whether or not there was truth in the defendant's pleas of former conviction, former acquittal and privilege.

The arguments filed in this court are very elaborate, and only those portions closely applicable to contested questions can be given in this report.

*R. E. Cowart and W. B. Dunham*, for the appellant: Keeping and exhibiting, and being interested in keeping and exhibiting, a gaming table, or bank, are continuous offenses.

An offense is, in its nature, indivisible. It may consist of an act, or a series of act. It may be instantaneous in its consummation, or it may require an interval of time. It is, however, but one offense. Assaults and batteries, robberies, thefts, etc., are instances of the first class. Nuisances, carrying weapons, offensive trades and industries, the use of false weights and measures, all illegal businesses and vocations, occupations and pursuits, and a large class of other cases where the offense is directed against the community at large and not against any one individual, such as adultery, bigamy, fornication, etc., are examples of the second class. Probably a decisive test of a continuous offense would be the running of the statute of limitations. In all continuous offenses the statute would commence to run

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Argument for the appellant.

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when the offense terminated. In keeping and exhibiting a gaming table, the offense would be complete and consummated when the party accused commenced to keep or exhibit a gaming table, and the statute of limitations would commence to run when the party accused ceased to keep or exhibit. For instance, in carrying arms the offense would be complete from the very time the party accused began to carry the arms, and would continue until he ceased to carry them. (See Whar. on Crim. Plead., 8 ed., sec. 311.) The Penal Code recognizes the existence of continuous offenses. (See secs. 59, 333, 337, 339, 388, 397, 405, 415, 424, 690, 691.) For a proper construction of such laws, see *Albrecht v. The State*, 8 Texas Court of Appeals, 319.

At common law keeping and exhibiting a gaming table was a species of the genus nuisance. (See Bish. on Crim. Law, secs. 1071, 1135, 1137; Whar. Crim. Law, secs. 1410, 1465, 1466; *United States v. Smith*, 5 Cranch, 659; *State v. Sindler*, 14 Ind.; 2 Bish. Crim. Proc., sec. 489.)

It is contended that a different rule is to be applied to *exhibiting* a gaming table. But we submit that there is no difference in principle between the two offenses, or rather stages in the same offense. A table may be kept by one and exhibited by another. But finally it is the same thing; when a table is kept for the purpose of gaming, it is exhibited, and when it is exhibited it is kept. The offense is complete when the gaming table begins to be kept for the purpose of gaming, though not a single game be ever played upon it. So also the exhibition is complete when the bank or game is displayed for the purpose of obtaining betters, though no bets are made upon it. If it were provided by law that each day or hour a gaming table is kept or exhibited constitutes an offense, then a different rule would apply. (*Burke v. The State*, 1 Ohio, 61.)

By the theory contended for, a gambler could evade it by beginning on the first of January of each year, keep up a display for that purpose throughout the entire year, and be guilty of but one offense. It is an offense for a merchant to pursue any occupation without a license. Under the rule laid down by the court below, when he closed his store at night he would cease pursuing the occupation, and would only begin again on the next morning when he opened up. It is the *business* in one case. In the other, it is the *practice*, the conduct, and means of livelihood of the party. We contend, however, that keeping and exhibiting a gaming table constitute but one offense when



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so charged. In the case of *Hinkle v. The Commonwealth*, 4 Dana (Ky.,) 519, the following language is used by Chief Justice Robertson:

"Although the setting up of a gaming table may alone be an indictable offense, the keeping of such table and the inducing of any person to bet upon it another, when such shall have been committed by different parties, or at different terms; nevertheless, as they are co-operating acts constituting altogether one offense when committed by the same person at the same time, an indictment for that combined act in violation of law may properly charge the whole in one count; and but one punishment can be inflicted as for one offense." In support generally of the position contended for, the following cases are cited: *Commonwealth v. Pray*, 13 Pickering, 364; *Commonwealth v. Odell*, 23 Pickering, 275; *Commonwealth v. Purley*, 2 Cushing, 184; *Commonwealth v. Tower*, 8 Metcalf, 527; *Commonwealth v. Elwell*, 8 Metcalf, 463; *Commonwealth v. Runnell*, 1 Gray, 388; *Commonwealth v. Jenks*, 1 Gray, 460; *Commonwealth v. Stone*, 3 Gray, 454; *Commonwealth v. Wood*, 4 Gray, 11; *Commonwealth v. Gardner*, 7 Gray, 494; *Commonwealth v. Brurton*, 10 Gray, 6; *Commonwealth v. Armstrong*, 12 Gray, 49; *Wells v. Commonwealth*, 12 Gray, 326; *Commonwealth v. McKenney*, 14 Gray, 1; *Commonwealth v. Langley*, 14 Gray, 21; *Commonwealth v. Taylor*, 14 Gray, 26; *Commonwealth v. Kingman*, 14 Gray, 83; *Commonwealth v. Gardner*, 14 Gray, 390; *Commonwealth v. Eads*, 14 Gray, 406; *Commonwealth v. Robinson*, 126 Massachusetts, 259.

The latter case is particularly referred to as containing a masterly exposition of the law on this subject.

A resume of the history of legislation on the subject of keeping or exhibiting gaming banks and tables in Texas will demonstrate the correctness of the propositions herein contained.

The convictions had in the mayor's court were a bar to this prosecution.

By the amended charter of the city of Dallas, the mayor's court had jurisdiction of this offense. (See *Ex parte Annie Wilson*, 14 Texas, Ct. App., 592.) It is admitted that a conviction or an acquittal in the mayor's court of this offense, if the offenses were the same, would be a bar. Section 21 of the amended charter expressly provides that a conviction or acquittal in the mayor's court shall be a bar to any further prosecution. To this, however, it is objected: first, that the convictions were obtained by fraud; and second, that the county court had al-

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Argument for the appellant.

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ready acquired jurisdiction by the information having been filed in said county court before complaints were filed in the mayor's court. The first objection may be dismissed without a word. No charge should have been given on the subject, as there was not a particle of evidence to justify it either as to the conviction had on the sixth day of September or on the twenty-ninth of October, 1883. So far as the conviction had on the sixth of September is concerned, defendant was arrested and tried before the county court had acquired jurisdiction. When tried on that day defendant had not been arrested by the State authorities. He was arrested on the fifth of September, and tried September 6 in the mayor's court. In the county court he was arrested on the sixth of September, 1883, and tried on the twenty-ninth day of January, 1884. Besides, what plea, even if defendant knew he had been informed against in the county court, could he have interposed to defeat the prosecution in the mayor's court? The judge below, in direct opposition to the law governing every other class of cases, held the date alleged in the information to be material. Instead of holding that the date alleged was immaterial so that it was within the statute of limitations, he permitted the State to elect the date named in the information, and held the proof to it.

The law does not demand impossibility, even at the hands of a party indicted for keeping or exhibiting a gaming table. How could he foresee what ruling the court would make? The informations filed September 5, against defendant, charged each of them a separate date, beginning on the twenty-fifth of August and ending on the fourth of September, 1883.

A plea that would have been good for the twenty-fifth of August, would have been faulty for the other dates between that and the fifth of September. It is admitted that in the prosecution on the twenty-ninth of October, the defendant knew he had been arrested one hundred and seventeen times in the county court. The last information in the county court was filed on the tenth day of October. Each information charged a different date—that is, where the information was for the same offense, as faro, keno, etc. If the defendant had filed his plea it would have been, on that date, the twenty-ninth of October, fatally defective. If he had by his plea covered all the dates and all the offenses, from the date first alleged down to the last, on the tenth of October, the time remaining, from the tenth down to and including the twenty-sixth of October, would not have been

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Argument for the appellant.

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covered; and the court would have been compelled to have overruled it. Whatever reason there may be for the principle contended for, that the court first acquiring jurisdiction absorbs to it to the exclusion of all others, so far as respects offenses consisting of an isolated act or acts, as assaults, thefts, etc., there certainly is no reason or sense or justice in applying it to those offenses which consist of a series of transgressions or a series of acts. Suppose one is charged in a justice's court with carrying a pistol, on a complaint filed January 1. Suppose that without being tried before the justice, he is arrested afterwards on information filed in the county court, February 1. Could he in the county court file any plea which would restrict the State to proof this side of the date of the filing in the justice's court? Suppose, too, that the justice trying the first case should confine the State to the date alleged in the complaint, and suppose that date had been ten days before January 1, then all the time prior to the date alleged in the complaint in the justice's court, and the time between the date alleged and the date of filing, would be uncovered by the proof or by a plea. Suppose, however, he should be tried in the county court first, and the proof went back over two years before that date, and admit that he began to carry the pistol just two years before the filing of the information in the county court, could he afterwards again be tried in the justice's court, and be convicted on proof covering the same dates covered on the trial of the information in the county court? (See *State v. Maker*, 21 American Rep., 269; *Bailey v. The State*, 11 Texas Ct. App., 168; *Cock v. The State*, 8 Texas Ct. App., 659.)

It is also contended that the convictions in the mayor's court are void because the complaints cover the time between certain dates, and also include a number of offenses. To the first objection it may be answered that in all the precedents the time is alleged in this manner. (1 Bish. Crim. Proc., secs. 393-5; Whart. Prac., title "Nuisance"; Whart. Pl., sec. 125.)

If it be admissible for the State, as was done in this case, to carve out of all the time from the date of filing back for two years just one day, it is also admissible for the city to carve out the time in the one case from May 5 down to the fifth of September, and in the other from March 31 down to October 26. It is better to do this in the pleading, as was done by the city, than to do so on the trial, as was done by the county attorney in this case.

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Argument for the appellant.

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The truth is that neither, strictly speaking, is correct. The law has not provided that each day a keno table is kept or exhibited shall constitute an offense. In the absence of such provision, all the time such a table is kept or exhibited prior and up to the date of the filing constitutes but one offense. If the prosecution in such offenses can cut out six months, a month, a day, and make that one offense, they can take each minute, each second, each tenth part of a second, *ad libitum*, and make the smallest appreciable time an offense, and then the number of offenses committed depends not upon the law, but upon the caprice or peculiar views of the prosecution. So far as time is concerned, there is no difference between selecting one day or six months. If one is valid, both are. The defendant has nothing to do with it.

The second objection is equally untenable. The information herein charges six offenses. First, it charges a keeping; second, an exhibiting; third, the combined offense of keeping and exhibiting; fourth, an interest in the keeping; fifth, an interest in the exhibiting; and, sixth, an interest in the combined offense of keeping and exhibiting. There is nothing said expressly about the form of the indictment or information in gaming cases in the Code of Criminal Procedure. The requisites of such indictments or informations are prescribed in the Penal Code, Article 361. It is only necessary to allege that a bank or table was kept or exhibited for the purpose of gaming. An indictment that alleges that John Smith, on a certain day not barred by the statute of limitations, did keep and exhibit, and was then and there interested in keeping and exhibiting, certain gaming banks, gaming tables and gaming devices, for the purpose of gaming and obtaining betters to the same, would be perfectly valid. Under it could be proved every conceivable banking game, every game played on a gaming table, and every gaming device. You could prove four hundred games under such an indictment. There is no misjoinder in misdemeanors, and the doctrine of election does not apply to them. (*Gage v. The State*, 9 Texas Ct. App., 259; *Bish. Crim. Prac.*, 8 ed., secs. 452 and 458, and notes.) Besides, such a joinder of offenses Mr. Bishop recommends as the proper practice. (See *The State, v. Fuller*, 34 Conn., 280; *Mobile and Ohio Railroad v. The State*, 51 Miss., 457; *Wharton's Crim. Pl. and Prac.*, secs., 292, 293, 910.) Whether under our system, where the punishment in misdemeanors, if the defendant calls for a jury, is assessed by them, such plead-

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Argument for the appellant.

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ing would be advisable may be questioned; that it would be perfectly legal cannot be doubted. (*Leath v. Com.*, 32 Grat., Va., 873.) Would the complaints upon which the convictions were had in the mayor's court have been defective on a motion to quash? We submit they could not have been held so. But suppose, for argument's sake, they were defective; the State cannot complain. As defendant did not make a motion to quash, nor move in arrest of judgment, and as he suffered the punishment imposed by the court, the matter is forever concluded. (Wharton's Crim. Pl., secs, 435, 457, 460, 507.)

That the convictions had in the mayor's court are a bar to this prosecution, we think, is too plain for argument. What is the test of a plea of former conviction? It is: Would the facts charged in the second indictment, if true, have been sufficient to have secured a conviction in the first? If they would, the plea is good. (*Lowe v. The State*, 4 Texas Ct. App., 34; *Vestal v. The State*, 3 Texas Ct. App., 648.)

His honor the judge below charged that the burden of establishing the truth of the defendant's plea to the satisfaction of the jury devolved upon the defendant. It is submitted that this is stating the rule too strongly. But admit, for the sake of argument, that the rule laid down is the correct one; how, then, is that burden met and shifted? There are, it seems to us, but three ways in which it can be done: first, by producing the record, that is, the complaints and judgments on them, and showing that the same evidence which is necessary to support the prosecution by information would have been admissible and sufficient to procure a legal conviction on the complaints. A *prima facie* case on this point being made out by the defendant, it was then incumbent on the prosecution to meet it by proof that the offense charged in the information in this case was not the same as that charged in the complaints upon which the defendant was convicted in the mayor's court. (Greenl. on Ev., sec. 36. See, also, the case of *Dunham v. The People*, 4 Scammon, Ill., 172, and which is also contained in 39 Am. Dec., 407, and reported by Mr. Freeman as a leading case on the subject.)

But grant, for the sake of argument, that the production of the complaints and judgments in the mayor's court were not sufficient to make out a *prima facie* case for the defendant, and shift the burden. Then, secondly, how could that burden be removed? It could be removed by showing that the issues were

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Argument for the State.

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the same in both cases—that is, the keeping and exhibiting, and being interested in keeping and exhibiting a keno table.

The date is not material so that it is within the statute of limitations. Then the judgments in the mayor's court founded on the complaints filed on September 5, 1883, and October 25, 1883, are conclusive, and not only embrace the matters which were actually determined in the case, but also extend to every other matter which might have been litigated in the cases. On the trial of the complaints, would not evidence of a keeping and exhibiting, when and as charged in the information herein, have been relevant and admissible? (See Wells, *Res Adjudicata*, p. 220, secs. 251, 253, *et seq.*) If it would have been, then the judgments of the mayor's court are *res adjudicata*, because matters cannot be re-litigated which might have been settled on the trial of the first case.

Suppose, however, that we are wrong in both these positions; then, thirdly, how can the burden be met? By showing that evidence of the same offense charged herein was introduced on the trials in the mayor's court. It is shown by the testimony of defendant's witnesses that in the trials in the mayor's court the proof covered all the time between the dates alleged, except Sunday, and that defendant was interested in keeping and exhibiting a keno table between the dates in both complaints.

Defendant having been subpoenaed and testified against other parties prosecuted for the same offense charged against him herein, on September 6, in the mayor's court, and on the twenty-ninth of October, 1883, in the same court, he is exempt from prosecution for all violations of the law about which he testified prior and up to the date of his so testifying.

*C. F. Clint*, for the State: For the sake of convenience, we treat of appellant's pleas separately, commencing with the plea of former conviction. The *onus* of this issue is on appellant. If, after he has adduced his affirmative proofs and arguments, it remains a matter of doubt as to whether the cases in which he was tried or testified are the same as the one at bar, the doubt must be resolved against him. For, even in civil affairs, he who assumes to affirm a fact must get beyond the sphere of doubt with his proofs; must carry them at least to a preponderating extent. I believe the very proofs adduced by appellant in support of this issue, not only raise a doubt as to whether the cases set out in his pleas and this one are the same, but show that

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Argument for the State.

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they are not one and the same. The most casual glance shows that, on the face of things, the city complaints and county court information bear little, if any, resemblance to one another. It is true, as a matter of time, the county court case is contained in the mayor's court complaints, but that does not suffice under a plea of former conviction to establish their identity, especially as time is charged in said complaints. Because they cover six months of time, or one hundred and fifty days, and the county court information happens to charge a day within the number, does not establish that both are identical in point of time. Under a plea of former conviction the time must, in deed and in truth, be shown to be exact and identical with the time of the case at bar. A mind with microscopic powers and infallible precision could not, even aided by the most lively imagination, by any process known to law, logic or philosophy, torture one hundred and fifty days into being identical with one day, and that day the twenty-seventh of August, 1883, without evidence clearly showing that the city elected to confine itself in the prosecution of the case to that day, which evidence does not exist.

But again, under all rules of pleading as to the averment of time, the city court complaints charge no time. For an uncertainty in the averment of time is in legal contemplation equivalent to no averment whatever of time. Therefore, as the city complaints charge no time, in the very nature of things it is impossible for appellant to show that in point of time the cases are the same. (1 Bish. Crim. Proc., sec. 239.) It will be seen that, if the city complaints are good as to time at all, it is on the fifth day of May, in the September case, and on the thirty-first day of March, in the October case, which lacks several months in either case of being the same as that charged in the county court case. (1 Bish. Crim. Proc., sec. 240.) So far, therefore, as the face of the complaints go, appellant has shown no identity between the cases.

But suppose the time to be legally charged as charged, do the witnesses, as to time, identify the offenses? There is no evidence whatever on this point. Barring the feature of time, do the offenses, as charged in the city complaints and county court information, appear, from the face of both, to be identical and the same, so far as the nature of the offense is concerned? The county court information charges keno. What do the city complaints charge? Nothing. They are void because of duplicity. Would an indictment which in one count charged theft,

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Argument for the State.

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embezzlement, swindling and robbery, be good as to any one of the four offenses charged? And if so, which one? That the offenses charged are different, separate and independent offenses will presently more fully appear. Suffice it now to say that if the complaints charge no offense, it would be impossible to say that, in point of the nature of the offenses charged, the cases are the same. But supposing the nature of the offenses as charged to be legally charged, are they, on the face of things, the same? Can you call faro, keno, high ball poker, and horse head under the name of keno? Can you identify keno as being faro, keno, high ball poker and horse head? Certainly not. Then, no evidence of exact identity can be gathered from the face of the papers.

Do the witnesses render the convictions had under the city court complaints identical with keno? No word of testimony shows it. It will be remembered that the city did not, of its own accord, or at the instance of appellant, elect to prosecute appellant for any one of the several offenses charged in the above complaints, nor elect any specific day or act, on which to proceed against him. But, so far as the record shows, the evidence introduced by the city may have been for one specific day or violation; or it may have been for all the different offenses and for the whole time charged in each complaint. The evidence is a perfect blank as to what offense or offenses appellant was convicted of, and for what time. So far as the proof shows, it may have been roulette or horse head, or high ball poker, or faro, or wheel of fortune, or keno. There is not the slightest evidence tending to show that his conviction was had for keno. Nor is there a particle of testimony which shows that the offense or offenses were committed on the twenty-seventh of August, much less that his trial in either case was for keno on the twenty-seventh of August.

As a matter of law, the keeping and exhibiting gaming banks and tables is not a continuous offense. The keeping of gaming houses was forbidden at common law, principally as a nuisance, but gambling, *per se*, was not an offense under that system. It was the nuisance feature attached to gambling at common law that made it continuous in its nature, or that caused it to be so treated. But under our statutes no part of it is treated as a nuisance. Under our statute it is, *per se*, an offense. Even the mere act of renting for gaming purposes is, *per se*, an offense. (6 Texas, 425; 1 Bish. Cr. L., 504, 1135.) It is prohibited in Texas



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Argument for the State.

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in nearly all its forms, and under strict and comprehensive legislation. On this offense common law authorities will be of no avail to the practitioner, nor even the decision of other States, as our statutes on the subject are *sui generis*. (Webb's Cr. L., 235.) This offense occupies the same status in our Penal Code that all other acts made penal, *per se*, occupy.

As to the appellant's legal status under his plea of privilege: Under the evidence it will be seen that appellant testified against one Ed. Hennessey, in the mayor's court, in behalf of the city, on September 6, 1883. His evidence covered the period of time averred in the complaints. The statute under which appellant was called to testify says, that any person summoned and examined shall not be liable to prosecution for any violation (not violations) of said articles about which he may testify. (Penal Code, Art. 367.) When it is remembered that this article was enacted in behalf of the State's interest, looking to the more effective prosecution of gamblers, and that a gambler is only given immunity under it from punishment as a consideration for his testimony, we will have little, if any, difficulty in measuring the relative rights and obligations of both the State and defendant, under the contract between them, which grows out of this statute. The State, on her part, undertakes to protect him against any violation about which he may testify. He goes upon the witness stand at the instance of the State, under this promise, and by virtue of it is compelled to testify to a violation. The promise from punishment only extends to a violation, and the compulsion that he is under to testify only extends to a violation. Suppose he testifies beyond the law's promise, and the law's compulsion, under what covenant in his contract can he afterwards claim protection from the consequences of such testimony? None whatever. The only benefit he conferred, or could confer, was in his testimony relating to the one violation. It was never contemplated that a man should be exempt from two violations for testifying as to one, and certainly never intended that a man should be exempt from seven hundred and thirty violations for having testified in one case. That would lead to the very opposite of what was intended by the law—an encouragement instead of suppression of the offense.

A witness will not be heard to say that he was compelled to testify to the time covered in the complaint, if it covers more than one offense, because, after he testifies to one, he is supposed to know that no compulsion can be used to make him

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Argument for the State.

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testify about others, and if the power to compel has ceased, the right to protection has also ceased. A court under this statute has no jurisdiction to hear more than one offense at a time, and, therefore, no jurisdiction to compel the giving of testimony to more than one violation, and, therefore, no power to fine, as for a contempt of court, or to require a witness to go further than the law compels him to and protects him in going. And if, knowing this (and in law a witness is bound to know), he consents voluntarily to proceed, he cannot be considered injured in law if, through the testimony then given, he is himself afterward convicted. For a maxim says, "That to which a man consents cannot be considered an injury." (Wharton's Maxims, 213, M. 99.)

In this case the above maxim is peculiarly applicable, for appellant, at the very time he consented to go farther than the law compelled him to go, was being represented by able counsel present there, not only to protect and advise him against it, for his own sake, but also the vital interest of the client whom he was then representing, and against whom appellant was testifying. He not only consented to disclose more than one violation, but the testimony of his counsel in this case shows that they both desired to have the examination include as many violations as possible, with a view to taking advantage of it in this and other cases then pending in the county court. This statute was enacted in the light of what the law required and permitted to be averred in a complaint, and not what, for some reason of his own, a pleader might see proper to aver. The law permits but one violation to be charged, and but one conviction for the violation; and when it declares that a witness should be exempt from punishment for any violation, it meant exactly what the words literally and spiritually import, in the light of *bona fide* rules of pleading.

Officers are presumed to know the law and follow it, and the Legislature acted on this presumption. It had no idea that a complaint would ever be drawn charging seven hundred offenses, and the provisions of this statute be resorted to to sustain it. Or that a witness could be found who would voluntarily aid in supporting it, and then attempt to torture its provisions into a shield for his protection against the laws of the land. The law will not permit itself to be so construed as to become a harbinger for crime, or an instrument of danger to the country's good. I do not believe that even the most abandoned construction of

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Opinion of the court.

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this statute will permit a defendant to say that because he has testified to a period of time that includes this particular offense, therefore he has testified to this violation or offense.

Of course appellant, in order to be entitled to protection against this prosecution, must be able to show that he testified to this identical violation. I submit that he has signally failed to do it. In fact, appellant has no desire to prove that either his plea of former conviction or privilege relate directly and exactly to this identical offense, for that would perhaps preclude him from using the same old convictions and swears in the remaining one hundred and eighteen cases against him. And he will, of course, pursue no course that would have that result. His argument must, therefore, adapt itself to a use of the pleas in each case, not only of keno, but faro, high ball poker, etc. Will such a course be permitted? Is a man to be permitted to say, when being tried for keno, that he was convicted for keno? and when prosecuted for faro, to say he was convicted of faro? and when tried for horse head, etc., that he was convicted of each one of these? and offer each time the same old conviction to sustain the plea each time? Is one conviction so prolific as to produce from within itself one hundred and nineteen convictions? Is testifying in one case so prolific a source of defense that it can produce at will one hundred and eighteen pleas in bar? Are pleas of former conviction and privilege such pliant and elastic tools? Not unless the office of each has degenerated from their wonted prestige and power and genuine usefulness, into the servile spaniels of a base purpose; not unless their former palladium functions have departed.

As appellant has failed to show either that he was ever convicted, or has testified in this identical case, his pleas of former conviction and privilege should be held not sufficient defense to this prosecution.

*J. H. Burts*, Assistant Attorney General, also for the State.

**HURT, JUDGE.** The information in this case alleged that appellant Kain kept and exhibited, and was interested in keeping and exhibiting, a keno table, on the fourth day of September, A. D. 1883.

To the information the appellant pleaded not guilty, former conviction in the mayor's court of the city of Dallas, former conviction and acquittal in the county court, and privilege from

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Opinion of the court.

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prosecution by reason of having been summoned and testifying in certain cases before the mayor's court, in which the parties prosecuted were charged with the same offense contained in this information.

The evidence in support of appellant's pleas of former conviction and acquittal failing to show that the offenses were the same in point of *identity of transaction*, it is absolutely necessary to assume and sustain the proposition that the offenses for which appellant had formerly been convicted or acquitted were, in their nature, continuous, and the learned counsel, perceiving this necessity, in his very able and exhaustive brief states the following as his first proposition: "Keeping and exhibiting a gaming table, or bank, are continuous offenses."

The question, therefore, is this: Are these offenses continuous in their character? If they are, the pleas of former conviction and acquittal can and should have prevailed.

These, we think, are correct propositions:

1. An offense is indivisible.
2. It may consist of a single act, or a series of acts.
3. It may be instantaneous in its consummation, or it may require an interval of time. • It is, nevertheless, but one offense.

A brief analysis of the above propositions will lead us to an easy solution of the main question, which is: Are the offenses of which defendant was convicted, or acquitted, continuous? While it is true that an offense is indivisible, still if it consists of a single act, or a series of acts, and to consummate it an interval of time (such an interval of time as is meant by certain authors and in opinions of Supreme Courts) is not required, it is not continuous in its nature. We deem it unnecessary to enter, at this time, upon an explanation of what is meant by "*interval of time*," contained in the third proposition above. For it will not seriously be contended that an offense consisting of but a single act is continuous in its nature.

Of what act, or acts, does the offense consist of which the defendant stands charged? Of keeping and exhibiting a keno table. Now, while it may be true that keeping a table is continuous in its character, very evidently, without aid from the Code, exhibiting is a single act and is not continuous. But we are not left to speculate or reason upon this subject, it being placed beyond cavil by the Code itself. Article 363 determines, in a manner not to be doubted, whether *exhibit* is continuous, or a single act; it speaks to this court in this unmistakable language:

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Opinion of the court.

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"The word exhibited is intended to signify the act of displaying the bank, or game, for the purpose of obtaining betters."

Exhibiting is made the act, and this act is made penal, and for this act defendant was convicted, the evidence showing him guilty of the same. Now, if defendant, on the fourth day of September, 1883, "exhibited a keno table for the purpose of obtaining betters," he violated the law of this State, for which the State had the right to demand the penalty. If he exhibited the table for this purpose, he committed an act forbidden by positive law, to which was annexed, on conviction, prescribed punishment. The State, however, neither in reason, justice or law, could demand but one conviction and punishment, and hence he pleads that he has been convicted, or acquitted, of this offense. Has this plea been sustained by him upon the trial? Upon whom is the burden of proof, and what must he prove to make good these pleas, or either of these pleas?

1. The burden is upon defendant.
2. He must prove the record.
3. Prove orally or otherwise the averment of identity of defendant and identity of offense.

"Prove identity of offense." Will proof of identity in the name of the offense, or identity in the elements of the offenses, discharge the burden? Unquestionably not. Just at this point it becomes of the first importance to revert to what constitutes an offense. An offense is an act or omission, \* \* \* Hence, the burden being on defendant to prove his pleas, and identity of offenses being averred (and a necessary averment), an act or omission, being the offense, to discharge the burden he must prove the identity of the act or omission, and in this case, as omission does not enter into the composition of the offense, he must prove identity of the act.

Upon this subject Mr. Wharton, in his work on Criminal Pleading and Practice, says: "The burden of proving a prior conviction of the offense charged against a defendant being upon him, it is not shifted by *prima facie* evidence of the identity of offense of which he has been previously convicted with that charged upon him." To this proposition as stated, without modification, we cannot agree, for if the evidence makes a *prima facie* case in support of the plea, it must preponderate in its favor, and a preponderance of proof will suffice to support the plea.

A very good illustration of the rule sought to be stated by

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Opinion of the court.

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Mr. Wharton above will be found in *Commonwealth v. Daley* (4 Gray, 209), a case cited by him in support of his rule. In that case Daley was being prosecuted under a complaint which charged him with selling intoxicating liquors on the eighth day of December, 1854, to one Jonathan Pierce. Daley's plea was *autrefois convict*. At the trial it appeared by the record of the former conviction that the sale there mentioned was to Jonathan Pierce, and the evidence was that the same witness testified on the former trial who was relied on to support this complaint, and that the only sales ever made by the defendant to Pierce were on the two separate days in January, 1854.

Under this state of facts the defendant Daley requested the judge to instruct the jury that "in order to obtain a conviction in this case the commonwealth must show on which of the sales the first conviction was had," but the judge declined to so instruct the jury. Daley, being convicted, appealed to the Supreme Court, and in that court insisted on a reversal of the judgment because the trial judge refused to submit to the jury the instruction above. The Supreme Court took a different view of that subject from that of counsel for Daley. Justice Bigelow, who delivered the opinion of the court, disposes of this matter as follows: "On the trial of the issue raised by the plea of *autrefois acquit*, the affirmative was upon the defendant. It is for him to maintain by proof the allegation in his plea of previous conviction, and to establish the identity of the offense charged in the complaint, or indictment, with that of which he stands convicted. Now, Daley did not make a *prima facie* case in support of his plea. It was in doubt on which of the sales the first conviction was had; he, by his requested charge, sought to cast the burden on the commonwealth to clear up the doubt by showing upon which sale he had been convicted, and by making this proof to establish a negative, that is, *that Daley had not been tried and convicted* of the offenses for which a conviction was then demanded. The Supreme Court, however, held that this was defendant's duty, and not that of the commonwealth; that he must prove that, in fact, he had been convicted for the sale charged in the complaint upon which he was then being tried.

Applying, then, the principle contained in that case to the case in hand, evidently neither of the pleas is sustained by the evidence, for upon defendant the burden rested to prove identity of offense—identity of act—this offense consisting of the act of

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Opinion of the court.

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displaying the bank, or game, for the purpose of obtaining betters. The appellant must prove not merely that he has been convicted of exhibiting keno for the purpose of obtaining betters at divers times, but that he had been tried and convicted or acquitted of the very act of displaying the keno table for which he was then being tried.

It may be urged, however, that in all of the prosecutions, as appellant was charged with *keeping* the keno table for the purpose of gaming, as well as *exhibiting* the table, and as the verdicts and judgments fail to show for which, the keeping or the exhibiting, he was convicted, that he is relieved of the burden of proving the identity of the offense—the act of exhibiting.

Concede, for the argument, that keeping the table is a continuous offense, and the above proposition becomes very plausible indeed. But keeping a table for gaming and displaying it for the purpose of obtaining betters are different and distinct acts, and, though the punishment may be the same, certainly the acts are not the same. And while it may be conceded, under the rules laid down in quite a number of well considered cases, that keeping certain banks, or tables, for the purpose of gaming, is an offense continuous in its nature, yet it does not follow that the act of displaying these banks, or tables, is continuous.

But let us suppose that the evidence, the whole record, leaves it in doubt as to whether defendant had been convicted of the keeping of the keno table, which is for the argument continuous, or convicted of the act of displaying the keno table for the purpose of obtaining betters, would such evidence meet and discharge the burden which rests upon defendant to prove the identity of the act of displaying the table on the fourth day of September, 1883? We are clearly of the opinion that it would not. The evidence in support of the pleas of former convictions, or acquittal, must meet the whole case, to wit: the act of displaying, as well as the keeping, unless the keeping, in its elements, includes all of the elements of “displaying the bank, or table, for the purpose of obtaining betters.” That the act of displaying the bank, or table, for the purpose of obtaining betters is not included in the charge of keeping a bank, or table, for the purpose of gaming, is quite evident.

We are of the opinion: First, that the act of displaying a bank, or table, for the purpose of obtaining betters is not a continuous offense. Second, that the burden is on the defendant to sustain his pleas of former convictions or acquittals. Third,

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Opinion of the court.

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that to meet and discharge the burden, it is incumbent upon him to establish by the evidence the identity of the act, or acts—keeping and displaying—these being charged in the information for which he has been tried and convicted, or acquitted. Fourth, that the record before us fails to furnish such proof, and his pleas were not sustained.

This disposes of the pleas of *autrefois convict* and *autrefois acquit*—former convictions and acquittals—alleged to have been had in the mayor's and county court.

At this point we deem it necessary to express an opinion in reference to a proposition earnestly insisted on in argument and brief of the learned county attorney representing the State in these cases. That proposition is that the court first acquiring jurisdiction of the case should hold it to the exclusion of all other courts, though they may have concurrent jurisdiction. Under this proposition, it is contended by the county attorney that though appellant had been regularly tried, convicted, or acquitted, of the very act, or acts, charged in the information upon which appellant was then being tried, still, as this information was pending upon the institution of the prosecutions in the mayor's court, that court could not legally take jurisdiction of the case, and that any conviction, or acquittal, had under the circumstances could not be pleaded in bar to a prosecution under the former pending information. All fraud apart, we cannot agree to the correctness of this proposition.

Let us illustrate: A steals a horse in Ellis county, carries it to Dallas county, and there sells it. He is indicted in Ellis county on the first day of January, and in Dallas on the fourth of the same month. Capiases issue on both indictments, and he is arrested on that from Ellis county; gives bond, and is arrested by the sheriff of Dallas county and placed in jail. On the tenth he is called upon to answer the indictment in the district court of Dallas county, and pleads in abatement the pendency of the indictment in Ellis county, and his arrest thereunder.

This court held, at its last Galveston term, that such a plea could not be interposed. A's plea being overruled and held for naught, he is forced to trial and convicted. He is carried to Ellis county and there placed on trial for the same offense, when he pleads *autrefois convict*. Shall he be told that his plea will not avail him, and that he must be tried, convicted and punished twice for the same theft? Common justice must answer these questions in the negative. <sup>f</sup>



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Opinion of the court.

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In this case both courts have jurisdiction of the theft—the jurisdiction is concurrent. Now, suppose that in these cases against the appellant, the city attorney of Dallas, in good faith, without collusion with, or without fraud upon the part of the appellant, had instituted these prosecutions against the appellant, the appellant could not, under the decision at Galveston term, have interposed the prior pendency in the county court of prosecutions for the same offenses, and therefore the practical result to him would have been two convictions and punishment for the same offense, if cut off from his plea of former conviction. We are aware that the county attorney is very clearly and cogently supported in his position, and that too by courts and judges of the most excellent character. But we believe that under our Code of Procedure and Constitution of the State, the correct doctrine in this State is that which allows the plea of former conviction or acquittal, under the above state of case.

We now come to appellant's plea of privilege. Article 367, Penal Code, provides that, "any court or officer having jurisdiction of the offenses enumerated in this chapter, or any district or county attorney, may subpoena persons and compel their attendance as witnesses. Any person so summoned and examined shall not be liable to prosecution for any violation of said articles about which he may testify."

"A witness so summoned and examined shall not be liable to prosecution for any violation of said articles about which he may testify." Let us suppose that the witness has been engaged in keeping and exhibiting banks and tables for two years prior to the commencement of the prosecutions against him; that some of his patrons have been prosecuted for betting at these games, and that the witness was subpoenaed and examined by the State in these prosecutions; that he testified to the keeping and exhibiting of and betting at these games, on a particular day or time; now, will the fact that he was subpoenaed and examined in relation to this particular transaction relieve him from all prosecutions for violation of the provisions of the articles "about which he testified;" or will he be exempt from prosecutions only as to the particular transactions about which he testified? The privilege is granted him of being exempt from prosecution in consideration of the right to refuse to answer questions criminating himself, which the statute takes away from him. So far as by virtue of the statute he has been compelled to testify as to any particular violation of the law the statute will protect him, but

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Syllabus.

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we see no reason why it should grant him any broader protection than that of which he has been deprived.

The record fails to show that he testified about this particular transaction, and hence his plea of privilege cannot avail him.

We will not discuss the question as to whether there was collusion between the city authorities and appellant, or fraud on his part in procuring the mayor's court to assume jurisdiction over these cases, for conceding every step taken in the mayor's court in the prosecution of these cases to have been strictly in good faith, with all fraud apart, appellant failing to prove the identity of the offenses, this question becomes of no importance.

We have examined the charge of the court very carefully, and are of the opinion that it is in harmony with the views expressed in this opinion.

While we have refrained from discussing *seriatim* all the questions raised in the brief of appellant, we have carefully examined them all and the authorities therein cited for their support, and in conclusion, we deem it but due to counsel for appellant to say that we have rarely had the pleasure of examining a more able and exhaustive brief and argument in any case in this court than that filed by him in this case.

We have carefully examined the entire record, and finding no error therein which requires a reversal of the case, the judgment is affirmed.

*Affirmed.*

Opinion delivered May 22, 1884.

16	312
31	243
31	315
16	312
133	135

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[No. 3099.]

TOBE ZOLLICOFFER v. THE STATE.

1. BURGLARY.—ACCOMPLICE TESTIMONY is not of itself sufficient to support a conviction. Such testimony must be supported by corroborating evidence, obtained from other sources, establishing not only the commission of the offense but the connection of the defendant with it. See the statement of the case for the evidence of a witness held to constitute him an accomplice, and for evidence held insufficient to corroborate his testimony.

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Statement of the case.

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2. **SAME—CHARGE OF THE COURT.**—While in some cases it may be proper enough for the court to assume, under a certain state of facts, that a witness is an accomplice, and so to instruct the jury, the better and safer practice is to submit that question to the jury, in all cases; but in doing so great care should be taken to instruct clearly and fully as to what will constitute an accomplice under Article 741 of the Code of Criminal Procedure.
3. **SAME.—ACCOMPLICE,** as used in Article 741, Code of Criminal Procedure, signifies any person who has participated in the commission of the crime, whether as a principal offender, an accessory, or in any other manner which makes him a *particeps criminis*. In this case the court charged upon the meaning of accomplice as follows: "For the purposes of this case it is sufficient to define an accomplice as one who participated in the commission of an offense as a principal, as before defined." *Held*, sufficient under the facts in this case.
4. **SAME.—NEW TRIAL** should be granted in all cases where the verdict of conviction is unsupported by competent evidence.
5. **SAME—FACT CASE.**—See evidence insufficient to support a conviction for burglary.

APPEAL from the District Court of Hill. Tried below before the Hon. Jo. Abbott.

The appellant was indicted April 4, 1884, by the grand jury of Hill county for the crime of burglary, charged to have been committed on the night of November 30, 1883, by forcibly entering the store house of C. A. J. Warren, otherwise called Charley Warren, without his consent and with intent to commit theft. On March 27, 1884, he was tried, and by the jury found guilty, and his punishment assessed at six years confinement in the State penitentiary. On April 4 defendant's motion for a new trial was overruled, and he gave notice of appeal.

C. A. J. Warren was the first witness for the State. He testified that, about sunrise on the morning of December 1, 1883, he went to his store in Hillsboro and found the back or south door open, with the bolt still in the locked position, but out of the catch. The door facing was bruised and torn as if the door had been pried open with some instrument. He found his goods much displaced, and, upon examination, missed several articles, including an overcoat, worth twelve dollars and a half; a pair of dark pants with a red stripe, worth ten dollars; one pair of gray pants worth, seven dollars and a half; about ten pounds of tobacco, worth five dollars; one dozen bottles of snuff, worth thirty cents per bottle; one pair of fur-tipped lady's gloves, worth one dollar; a lady's scarf, worth one dollar; two scarfs, worth

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Statement of the case.

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seventy-five cents each; a number of nickel sleeve and collar buttons, worth fifty cents per pair; several silk handkerchiefs, worth from seventy-five cents to a dollar each; one hat, worth two dollars and a half; and a number of pocket knives, worth seventy-five cents and a dollar each. He found his money drawer cut open, as if with a knife. The overcoat and dark pants were missed from the middle counter, about the center of the room; the light pants from a table adjoining the middle counter on the north, the hat from a box in the northeast corner, a pair of boots from a box near the front of the building, the gloves, scarfs, knives, buttons, handkerchiefs and some other articles from one of the three show cases. The cash drawer was on the east side of the house. Witness gave no one his consent to enter the said building during the night previous, or to take any of the goods described. The witness's store was situated on the south side of the public square, in the town of Hillsboro, Hill county, Texas. The burglary occurred on the night of November 30, 1883.

Within a week or two after the burglary the witness went with Captain S. C. Upshaw to a house on his place, and found several of the missing articles, among them the dark pants, the lady's scarfs, the sleeve and collar buttons, neckties and silk handkerchiefs. Witness identified the pants, scarfs, and some of the other articles, and took them away. Other articles which the witness found at this house he believed to be his, but he could not positively identify them, and for that reason did not take them. He found there other articles which he identified as his, but did not take, as they had been so soiled he had no use for them. The witness identified the scarf by his cost and selling mark, both of which were written in his own handwriting. Witness found a pocket book in the possession of one of Ann Raglan's girls, and a sleeve button in the possession of a colored woman on Captain Upshaw's place.

Willie Green, colored, was the next witness placed upon the stand by the State. He testified that on Friday night, November 30, 1883, between the hours of two and three o'clock, he was on his way home to the Kentucky House, near the Missouri Pacific railway depot, in Hillsboro, Texas. When he got into the alley between Booth & Son's law office and the residence of Doctor Bond, he was overtaken by Willis Brown, Tobe Zollicoffer (the defendant), Roe Elliott and Smith Barnes. Brown, who had an ax in his hand, hailed the witness, saying: "Willie, we going down here to get some." Witness asked: "What?"

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Statement of the case.

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Brown replied: "We are going around to Charley Warren's store to get some clothes, and you must come and go with us." Witness replied that he was going home, and would not go with them to get things in that way; that he had not been raised to get things that way. Brown and Barnes then told witness that he had to go; that witness needed some clothes and a hat. Witness again declined to go, when Brown and Barnes pulled out their pistols and presented them at the witness's breast and told witness that he had to go with them, and that if he told, they would shoot witness full of holes. Witness then agreed to go.

The party named, including the witness, then went to the rear of Warren's store, Brown and Barnes keeping their pistols in their hands. Brown finally put up his pistol, inserted the blade of his ax between the door and the facing and pried them apart. The defendant placed his back against the door and pushed it in. The entire party then went into the store. They went first to the cash drawer, which Barnes cut open, using both the ax and a knife. No money was found, and Barnes remarked: "Boys, there is no money here. I was in hopes we would find a hundred or two dollars here. I would like to sink him for about that much. He is getting too d—d 'biggity,' d—n him. But as we can't get money, we will take some good clothes, which is the same thing." Brown held the candle while Barnes cut the drawer open. The party crossed to the cash drawer on the other side, shook it, but did not open it. The party then began to help themselves to such articles as they wanted. Brown took a dark pair of pants, worth ten dollars; gray pants, worth seven dollars and a half; some tobacco, worth fifty cents a pound; some snuff, worth thirty cents a bottle; a lady's scarf, worth a dollar; two scarfs worth seventy-five cents each; a pair of fur-tipped gloves, worth a dollar; some neckties, worth fifty cents each; some nickel sleeve and collar buttons, worth fifty cents each, and several silk handkerchiefs, worth seventy-five cents and a dollar a pair. When the door was opened Brown and Barnes again threatened witness with their pistols and said they would kill witness if he told. The cash drawer that was broken open was on the west side of the house.

Tobe Zollicoffer, the defendant, took an overcoat worth twelve dollars and a half; some snuff, worth thirty cents a bottle; some tobacco, worth fifty cents per pound; and a pocket knife, worth one dollar. Smith Barnes took a pair of boots, worth seven and

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Statement of the case.

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a half dollars, some snuff and tobacco, a pair of gloves worth seventy-five cents, and two or three silk handkerchiefs worth seventy-five cents and a dollar each. Roe Elliott got a knife which Willis Brown handed him. The dark pants and overcoat were taken from the middle counter, the gray pants from a table near, the tobacco and snuff from the west side near the south end, the boots from the front end, the hat from a box in the northeast corner, and the other articles from a show case.

Cross-examined, the witness testified that he told no one about the burglary until after his arrest. He had talked with none of the parties engaged in it after the burglary and before his arrest. None of the parties had threatened the witness since the night of the burglary. The witness first intended, if detected, to employ a lawyer to get him out of the trouble, but after his arrest was told that no lawyer could benefit him. He concluded, therefore, as the best he could do for himself, to turn State's evidence. Witness was talked to about turning State's evidence several times by different parties. He was told that he had no other means of saving himself; that if he did not turn State's evidence he would get at least twelve years in the penitentiary, and that if he did he would get only a light punishment at most. All of the parties engaged in the burglary had a grudge at the witness; Brown particularly was angry with him. Witness did not know who called to him in the alley, until they overtook him. Witness left the store first after the burglary, waited outside until the others came out, and followed them off about one hundred yards, and last saw them on that night going toward Freedmantown. Witness then went home, went to bed and slept until morning. Witness had been indicted for this offense, but did not know whether or not he was yet clear.

S. C. Upshaw testified, for the State, that some two or three weeks after the burglary of Warren's store, he went with Charley Warren to a house on his, witness's, place, and found several articles of merchandise in a trunk belonging to Willis Brown. Brown was at that time in jail, charged with the theft of a hat. Warren claimed and took away some of the articles, among which was a pair of dark pants with a stripe. Before the witness took Warren to that house, he had seen some of the goods, and supposed them to belong to Eastham Bros., who had recently lost some goods. Eastham Bros. not claiming them, witness told Warren, with the result stated.

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Opinion of the court.

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The motion for new trial presented the questions involved in the opinion of the court.

*W. L. Boothe*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** This conviction is based upon the testimony of one Green, a witness who, from his own statements, was, we think, unquestionably an accomplice in the burglary and theft charged against the defendant and others. He stood indicted for the same offense, and had turned State's evidence to avoid being prosecuted. Being an accomplice, his testimony does not warrant this conviction unless it is corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense. (Code Crim. Proc., Art. 741.) We have searched the record in vain for any evidence corroborating the witness Green, which, even in a remote degree, tends to connect this defendant with the offense committed. There is evidence corroborating him as to another party charged, but none whatever as to this defendant. There is not a circumstance proven which points to this defendant's guilt. His conviction rests upon the testimony alone of the witness Green. This being the state of the case, the judgment of conviction must be set aside for the want of competent evidence to support it.

It is insisted by appellant that the court erred in submitting to the jury the question as to whether or not the witness Green was an accomplice; that the court should have directly charged the jury that he was an accomplice, the evidence being so conclusive of that fact. Whilst it would not, under some facts, be improper for the court in its charge to assume, and to instruct the jury that a witness is an accomplice (*Williams v. The State*, 42 Texas, 392; *Barrera v. The State*, Id. 260), still we do not think it is error to submit the question to the jury. It has been the practice in such cases to submit this issue to the jury, and, believing the practice to be a safe and proper one, and in harmony with the spirit of our system of procedure, we are not disposed to change it.

In submitting this issue to the jury, however, the court should be very careful to instruct clearly and fully as to what will constitute an accomplice within the meaning of Article 741 of the

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Syllabus.

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Code of Criminal Procedure. The word "accomplice" as used in that Article signifies any person who has participated in the commission of the crime, whether as a principal offender, an accessory, or in any other manner which makes him a *particeps criminis*. (*Roach v. The State*, 4 Texas Ct. App., 46; *Smith v. The State*, 13 Texas Ct. App., 507.)

In the case before us the court instructed the jury upon the meaning of an accomplice as follows: "For the purposes of this case it is sufficient to define an accomplice as one who participates in the commission of an offense as a principal, as before defined." In a previous portion of the charge the court had fully explained what facts constituted a principal. We are of the opinion that, under the facts of this case, the explanation of the term accomplice given in the charge was sufficient. If the witness Green was in fact a *particeps criminis* in the offense, it was as a principal, and the charge therefore was strictly applicable to the evidence, and as full as the facts demanded.

We are of the opinion that the court erred in refusing to grant defendant a new trial. The verdict of the jury was unsupported by competent evidence, and was contrary to the charge of the court. In such cases trial judges ought not to hesitate to set aside verdicts.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 24, 1884.

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[No. 2967.]

16	318
37	364

JANE L. TURNER v. THE STATE.

1. PRACTICE SUBSTITUTION OF LOST PAPERS.—Whether or not it is well supported in reason, the rule that suspends all proceedings in the trial court after appeal has been perfected, must be held to prohibit the trial court from amending the record pending appeal, and to the same extent operates to prohibit the substitution of any part of the record after appeal. This rule is not commended by this court, but is upheld on the principle of *stare decisis*.



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Opinion of the court.

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2. **SAME—CASE STATED.**—After the appeal in this case was perfected the record in the trial court, except the judgment of conviction, the amended motion for new trial, the judgment overruling the same, and the appellant's recognizance, was destroyed by fire. At the next term of the court the county attorney, over objection, was permitted to substitute the complaint and information. Thereupon the defendant was permitted to substitute the other portions of the record, consisting of the statement of facts, bills of exception, charge of the court, assignment of errors, etc. *Held*, that such substituted papers, under the rule announced, cannot be considered by this court.
3. **SAME—INFORMATION.**—The substituted papers in this case being such as cannot be considered, the conviction is without information or indictment to sustain it.

**APPEAL** from the County Court of Parker. Tried below before the Hon. A. J. Hunter, County Judge.

From the judgment of conviction and such parts of the transcript as were not attempted to be substituted, it is ascertained that the defendant was convicted of keeping a disorderly house, and fined three hundred dollars. The opinion otherwise discloses the case.

*Lanham & Stephens, for the appellant.*

*J. H. Burts, Assistant Attorney General, for the State.*

**WILLSON, JUDGE.** After the appeal in this case was perfected the record in the trial court, except the judgment of conviction, the amended motion for new trial and judgment overruling the same, and defendant's recognizance, was destroyed by fire. At the next term of the court after said destruction, the district attorney moved to substitute the complaint and information which had been so destroyed, which motion was excepted to by the defendant, upon the ground that, as the appeal had been perfected, and the case was then pending in the Court of Appeals, the trial court no longer had any jurisdiction in the case, and could not legally make any orders therein. This exception was overruled, and the complaint and information were in due form substituted. Thereupon, on motion of the defendant, the other destroyed portions of the record, consisting of a statement of facts, bills of exception, charge of the court, assignment of errors, etc., were also in due form substituted. This substituted record has been brought before this court in answer to a writ of

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Opinion of the court.

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*certiorari*, granted upon motion of the Assistant Attorney General, and the question is presented whether or not we can consider the same as the record in the case.

Did the court, pending the appeal of this case, have authority to substitute the destroyed papers so as to make the substituted copies a part of the record of the case?

It is provided that "the effect of an appeal is to suspend and arrest all further proceedings in the case in the court in which the conviction was had until the judgment of the appellate court is received by the court from which the appeal was taken." (Code Crim. Proc., Art. 849.) In view of this provision it has been held by this court that after an appeal has been perfected, and while it is pending, the court *a quo* has no power to *amend* the record. That the said court has no further authority or control over the case; as a court, its authority, its jurisdiction, is suspended and arrested by the very terms of the law, as to *all* further proceedings. (*Hill v. The State*, 4 Texas Ct. App., 559; *Knight v. The State*, 7 Texas Ct. App., 206.) If then the court *a quo* has no authority to *amend* the record, it would, for the same reason, be without authority to *substitute* it, pending the appeal.

We can perceive no difference between the amendment and the substitution of a record, in principle or practice, and the doctrine of the above cited cases applies, we think, with equal force to either proceeding. If this be so, the cases cited are decisive of the question before us, and we cannot consider the substituted record as a portion of the record in the case. Whilst we entertain doubt as to the correctness of these decisions, we shall adhere to the rule settled by them, upon the principle of *stare decisis*. We are of the opinion that the rule as thus declared is not a proper precedent or just one, and that it ought to be changed by legislation. A safe mode should be provided by law for amending and substituting records in the court *a quo*, even while an appeal in the case is pending. As the rule now is, there is no power lodged anywhere to supply a lost record, after an appeal has been perfected and is pending, or even to amend a record in such case. We can imagine cases where the want of such power in the courts might result in serious and irreparable wrong.

In this case, in the record proper before us, there is no information or indictment, and therefore nothing to sustain the conviction. It must appear from the record that the conviction is

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Syllabus.

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based upon a valid information or indictment, or it cannot stand. (*Pierce v. The State*, 14 Texas Ct. App., 365; *Beardall v. The State*, 4 Texas Ct. App., 631.)

Because there is no information or indictment in the record, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered May 28, 1884.

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[No. 3154.]

EX PARTE R. W. PORTER

1. **HABEAS CORPUS—CASE STATED.**—The applicant was committed in default of bail by a justice of the peace to await the action of the grand jury on a charge against him of theft of a horse. The grand jury, by mistake, returned an indictment against him for the theft of a saddle, which mistake was not discovered until after the discharge of the grand jury. The district attorney moved the court to hold the applicant over until the next meeting of the grand jury, which motion the court refused. Thereupon a second prosecution for the theft of a horse was instituted before a justice of the peace, who, sitting as an examining court, again committed the applicant, in default of bail, to await the action of the next grand jury. Applicant then applied to the district judge for a writ of *habeas corpus*, which was awarded, but, upon the hearing, the applicant was remanded to custody in default of bail. No trial upon the merits was had upon the *habeas corpus*, the applicant admitting the existence of probable cause for believing that he was guilty; but he demanded his discharge upon the ground that the second prosecution before the justice was barred by the previous one, and that the subject matter was *res adjudicata* as to any examining court, and he could no longer be detained to answer said charge except under an indictment by the grand jury. *Held*, 1. That, upon the failure of the grand jury to present an indictment against him for horse theft, at the term succeeding his commitment, the applicant was entitled to his discharge, and a dismissal of *that* prosecution, no good cause to the contrary, supported by affidavit, being shown to the court. 2. The doctrines of *res adjudicata* and jeopardy do not apply to proceedings before examining courts; and the second prosecution and proceedings in the examining courts were warranted by law.
2. **SAME—JEOPARDY.**—A person is in legal jeopardy only when he has been placed upon trial before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and when a jury has been charged with his deliverance.

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Opinion of the court.

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3. SAME.—A dismissal of a prosecution before jeopardy has attached, without a trial upon the merits and a judgment of acquittal or conviction, is not a bar to another prosecution for the same offense.
4. SAME.—It is expressly provided by statute (Code Crim. Proc., Art. 281) that a discharge by a magistrate upon an examination of any person accused of an offense shall not prevent a second arrest of the same person for the same offense. The same rule applies in case of a commitment.
5. SPECIAL PLEAS OF FORMER ACQUITTAL AND CONVICTION are provided for by statute (Code Crim. Proc., Arts., 523 and 524), and are the only pleas of *res adjudicata* recognized in criminal proceedings, except in the case of judgment upon *habeas corpus*.
6. HABEAS CORPUS.—When a person accused of an offense has been discharged under *habeas corpus* proceedings, he cannot be detained in custody upon the same charge until after he shall have been indicted therefor.

HABEAS CORPUS on appeal from the District Court of Travis.  
Tried below before the Hon. A. S. Walker.

The opinion discloses the case.

D. H. Hewlett, for the applicant.

J. H. Burts, Assistant Attorney General, for the State.

WILLSON, JUDGE. On the eleventh day of December, 1883, appellant, in default of bail, was committed to the jail of Travis county, by Justice Tegener sitting as an examining court, upon the charge of theft of a horse. There was no bill of indictment for this offense presented against him by the grand jury at the next term of the court after said commitment. It appears that by mistake said grand jury presented an indictment against him for the theft of a saddle instead of for the theft of a horse. This fact being ascertained after the discharge of the grand jury, the district attorney moved the court to hold the appellant over to the next sitting of the grand jury, to answer the charge of theft of a horse. This motion the court declined to grant. Thereupon, immediately, a second prosecution for theft of a horse was instituted against appellant before Justice Von Rosenberg, and said justice, sitting as an examining court, again committed appellant, in default of bail, to the county jail to await the action of the next grand jury upon said charge of theft of a horse. Appellant applied to the Hon. A. S. Walker, judge of the sixteenth judicial district, for a writ of *habeas corpus*, which

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Opinion of the court.

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was granted, and, upon a hearing thereof before said judge, appellant was remanded to the custody of the sheriff in default of bail in the sum of four hundred dollars, and from this judgment he has appealed to this court.

It was admitted by appellant, on the *habeas corpus* trial, that there existed probable cause for believing that he was guilty of the charge of theft of a horse, the charge upon which he was detained, and he did not seek to be discharged from custody upon the ground that he was innocent of said charge. Therefore, a trial upon the merits of the case was not had upon *habeas corpus*. Appellant sought to be discharged from custody upon the ground alone that the second prosecution against him for the same offense, before Justice Von Rosenberg, was barred by the previous prosecution before Justice Tegener; that, having been once proceeded against before an examining court, and by said court committed to custody for said offense, and having performed the judgment of that court, he could not again be prosecuted for the same offense before an examining court, the subject matter, as to said court, being *res adjudicata*, and that he could not any longer be detained to answer said charge except under an indictment by the grand jury.

There is no question but that appellant, upon the failure of the grand jury to present an indictment against him for the offense of theft of a horse, at the next term of the court after his commitment for said offense by Justice Tegener, was entitled to an order of the court discharging him from custody under *that* prosecution, and dismissing said prosecution. This was his right under the statute, no good cause to the contrary, supported by affidavit, being shown to the court. (Code Crim. Proc., Art. 592; *Bennett v. The State*, 27 Texas, 702.) Whether or not such an order of the court was made and entered does not appear, but the question in this case is immaterial, as appellant makes no complaint that it was denied him, and it appears that he is no longer detained under the first commitment, but is now detained under and by virtue of another prosecution.

We are of the opinion that the doctrine of *res adjudicata* does not apply to proceedings before examining courts. Those proceedings are only preliminary in most cases, and in felony cases said courts have no jurisdiction to render final judgments. The chief objects of such proceedings are to secure the presence of persons accused of crime before the proper tribunals, to answer for the offenses charged; to secure also the attendance of the

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Opinion of the court.

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witnesses, and to preserve the testimony. It was never intended, we think, that the doctrine of *res adjudicata*, or jeopardy, should have any application to such proceedings. A person is in legal jeopardy only when he has been put upon trial before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance. (Cooley Const. Lim., 404; *Vestal v. The State*, 3 Texas Ct. App., 648.) The dismissal of a prosecution before jeopardy has attached, without a trial upon the merits, and a judgment of acquittal or conviction, is not a bar to another prosecution for the same offense. (*Brill v. The State*, 1 Texas Ct. App., 152; *Goode v. The State*, 2 Texas Ct. App., 520; *Quitow v. The State*, 1 Texas Ct. App., 47; *Longley v. The State*, 43 Texas, 490; *Swindell v. The State*, 32 Texas, 102.) It is expressly provided in our Code that a discharge by a magistrate, upon an examination of any person accused of an offense, shall not prevent a second arrest of the same person for the same offense. (Code Crim. Proc., Art. 281.) This provision furnishes conclusive evidence to our minds that it was not the intention of the Legislature to make the proceedings of an examining court a bar to subsequent proceedings before such a court involving the same transaction. If *res adjudicata* does not apply in the case of a *discharge*, we see no good reason why it should apply in the case of a *commitment*. Our Code provides for the special pleas of former acquittal and former conviction (Code Crim. Proc., Arts. 524-553), and these are the only pleas of *res adjudicata* recognized in our criminal procedure, except in the case of a judgment upon *habeas corpus*. (Code Crim. Proc., Art. 186.) Neither of these pleas, in our opinion, has relation, or is in any manner applicable to the case before us.

It is earnestly insisted by appellant's counsel that if this second commitment is legal, other subsequent prosecutions and commitments may be maintained so long as the grand juries may fail to present an indictment against the accused, and that in this way the prosecution may be kept alive, and the accused detained in custody for an indefinite length of time, without legal remedy. That such an instance might occur is perhaps possible, but, we think, by no means probable. If there exists against the accused no probable cause for believing him to be guilty of the offense charged against him, the law places within his reach a speedy and efficient remedy, which is the writ of *habeas corpus*, and

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Syllabus.

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when he has been once discharged from custody under this writ, he cannot again be detained in custody upon the same charge until after he shall have been indicted therefor. (Code Crim. Proc., Art. 186.) This remedy will rarely ever fail to set at liberty and protect from groundless prosecution the innocent citizen, and that it will not suffice to turn loose those who are *prima facie* guilty is an objection which commends instead of condemns it.

It is provided that the provisions of our Code of Criminal Procedure shall be liberally construed, so as to attain the objects intended by the Legislature—the prevention, suppression and punishment of crime. (Code Crim. Proc., Art. 27.) Examining courts constitute a very important part of the machinery provided by law for the attainment of these objects, and we think it would be a narrow and unauthorized construction of the provisions of the Code to hold that the doctrine of jeopardy and *res adjudicata* applied to the preliminary proceedings of these courts.

We hold that the second prosecution of the appellant before Justice Von Rosenberg, and the proceedings thereunder, are legal and valid, and that there is no error in the judgment appealed from; wherefore said judgment is affirmed.

*Affirmed.*

Hurt, Judge, is not prepared to concur in or dissent from this opinion.

Opinion delivered May 28, 1884.

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[No. 3107.]

JOHN HARRISON v. THE STATE.

1. PRACTICE—BILL OF EXCEPTIONS, to be entitled to consideration, must have been presented to the trial judge for allowance and signature during the trial term, and within ten days after the conclusion of the trial. A trial is "concluded" by the judgment overruling a motion for new trial, or in the event that no such motion, and no motion in arrest of judgment is made, the conclusion of the trial is when the verdict of the jury has been received. The bill of exceptions in this case is sufficient

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Statement of the case.

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because approved in term time, and within ten days after the motion for new trial was overruled.

2. **SAME—EVIDENCE—NEW TRIAL—CASE STATED.**—Instead of confining his testimony to a statement of facts, a State's witness persisted in stating his suspicions and conclusions as to defendant's guilt. The defense objected, and requested that the examination of the witness by State's counsel be so confined as to elicit direct answers. The court refused to regulate the examination of the witness, but instructed him to confine his statements to facts in answer to questions propounded, and further directed the jury to disregard such statements of the witness as were merely suspicions, conclusions and opinions. Notwithstanding such instructions, the witness still persisted in injecting into his testimony statements which were not evidence, and were well calculated to prejudice the defendant. *Held*, that the court should have punished the recusancy of the witness as contempt of court by fine, or, if necessary, imprisonment. *Held*, further, that in view of the unsatisfactory nature of the inculpatory evidence, a new trial should have been awarded.
3. **SAME—FACT CASE.**—See statement of the case for evidence *held* insufficient to support a conviction for theft; wherefore the motion for new trial should have prevailed.

**APPEAL** from the District Court of Brazos. Tried below before the Hon. W. E. Collard.

The conviction in this case was for the theft of seventy dollars in money, the property of J. W. Tabor, in Brazos county, Texas, on the tenth day of August, 1881. A term of three years in the penitentiary was the punishment imposed.

The first witness for the State was J. W. Tabor. He testified, in substance, that one night, about the time mentioned in the indictment, he went to bed on his gallery, hanging his pants, which contained his pocket book and money, at the head of his bed. The defendant lived in a house about two hundred yards to the side, and a little in the rear of witness's house. The defendant customarily left his house early in the morning, but did not do so on the morning after the night spoken of, as the witness, when he first got up, and before he missed his money, saw him standing on the gallery of his house. Some time after he dressed the witness missed his pocket book and money, the money being fives, tens and twenty dollar United States currency bills, aggregating seventy dollars, but whether treasury or bank bills the witness did not know. Upon examination he found foot prints on the ground near the head of the bed, and in his yard, and followed them to his yard fence. The track indicated that the upper leather of a shoe had been torn from the



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Statement of the case.

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sole, and that, when the wearer walked, the upper part would lap over the sole and make an impression on the ground on both sides of the foot.

The witness and the defendant started to town from their homes on that morning at the same time, and met in the road. Witness then noticed that the uppers of a shoe worn by defendant were loose from the sole, and that they made a track similar in every respect to the tracks discovered in his, witness's, yard. Afterward, on the same morning, witness saw the defendant on the streets of Bryan, and had him make a track in the sand. That and the track in the witness's yard were in every particular similar. In having him make the track in the sand the witness used no more compulsory force than a peremptory order. The defendant hesitated, and made the track unwillingly. Previous to that witness had the defendant to make a track at his, witness's, store, but did not remember who was present. The witness had never consented to the taking of his money by any one.

Cross-examined, the witness stated the defendant was a negro. Neither he nor his wife had ever been in his, witness's, employ, and neither had ever been on his premises that he was aware of. Witness did not remember whether or not he had any negro employed at his stable at that time. He did not know the number of the shoe worn by the defendant at the time, nor the number of shoe that made the tracks in the yard. Defendant has a good-sized foot. The uppers of the shoe making the tracks described did not extend over the end of the foot and make impressions on the ground, but did on the sides. Uppers cut loose from the soles of a shoe will always make marks on impressionable ground. The person who made the tracks in the yard walked tip-toe until the fence was crossed. The track from the fence went in the direction of the defendant's house.

George R. Tabor, son of the prosecuting witness, testified, in substance, that he reached his father's house from his sleeping room in town about seven o'clock on the morning of the theft of the money, and then first heard of it. He examined the tracks in the yard, and described their peculiarity as the first witness did, except that he stated the loose upper made an impression only on one side of the foot, and the sole left an impression of pegs. He followed this track to the defendant's gate, where the defendant met him and asked him if he had lost any money, to which witness answered no, that he was hunting a place to dig a well. When defendant came out to meet witness he seemed

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Statement of the case.

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to put his whole foot down in walking. Witness did not notice his foot, but noticed the track he made, which was similar in appearance to those discovered in Tabor's yard. The track led from Tabor's yard fence to defendant's gate, as though to go in; it did not pass the gate or go away. Witness did not go into the defendant's yard or house. His gate opened on a public road.

The cross-examination resulted in no material change of this witness's testimony. Freedmantown was some three or four hundred yards distant from Tabor's house. One of the only two roads leading from the oil mills to Freedmantown passed directly in front of defendant's gate. This, however, was not the usual route traveled. Many negroes lived back of Tabor's house toward the oil mills, and could have access to Tabor's house by going through the field. Very few people were in the habit of passing Tabor's house. The oil mill and lower Freedmantown route, leading by Tabor's house, was the nearest but not the only route.

Robert Tabor testified that he heard of the loss of the money about nine o'clock a. m. He went horseback to defendant's house, but did not find him at home. He went to defendant's brother's house, about a mile from town, and found defendant. He first refused to come out, but being called a second time, he came out with a hatchet in his hand, and finally went to town with witness. Witness saw the tracks at his father's house, and the one at his father's store. They were alike. He did not notice the track made by defendant on his way to town. The State closed.

Sallie Archie, the first witness for the defense, testified that she was living with the defendant at the time of the alleged theft; was at home all that night; had a light all night, nursing a sick child. She knew that the defendant was in his room the whole of that night, and did not get up, or go out, at any time during the night. Pin Adams's son Clement came to the house about twelve o'clock that night, and called to defendant to get a gun, but the defendant refused to get up. A great many people were in the habit of passing along the lane which ran in front of defendant's gate. Witness was the wife of John Archie. She had not known Clement Adams very long at that time, but sufficiently long to recognize his voice when he called for the gun. Clement was now living in Galveston. Witness was morally certain that defendant did not leave the house that night. She

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Opinion of the court.

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did not see him with any money, and got none from him subsequent to that night.

The questions discussed in the opinion were presented by the motion for new trial.

*A. C. Brietz and Henderson & Henderson, for the appellant.*

*J. H. Burts, Assistant Attorney General, for the State.*

WILLSON, JUDGE. 1. A bill of exceptions, to entitle it to be considered by this court, must have been presented to the trial judge during the term at which the trial was had for his allowance and signature, and within ten days after the conclusion of the trial. (Rev. Stats., Art. 1363; Code Crim. Proc., Art. 686.) In this case a bill of exceptions, objected to by the Assistant Attorney General, was allowed and signed by the trial judge, and filed in the record, during the term, and within ten days after an order of the court overruling the defendant's motion for a new trial. This, we think, was in compliance with the statute, and we so understand the statute to have been construed by our Supreme Court. (*R. R. Co. v. Joachimi*, 58 Texas, 452; *Blum v. Schram & Co., Id.*, 524.) The judgment of the court overruling the motion for a new trial being regarded as the "conclusion of the trial." 'If there had been no motion for new trial made, nor motion in arrest of judgment, the conclusion of the trial would be, we think, when the verdict of the jury is returned into court and has been received. (*McCall v. The State*, 14 Texas Ct. App., 353.)

2. It appears from a proper bill of exceptions that the prosecuting witness Tabor, whose money is charged to have been stolen by defendant, when testifying in the case in behalf of the State, instead of confining his testimony to *facts*, persisted in stating his *suspicions* and *conclusions* as to defendant's guilt. This was objected to by defendant's counsel, and the court was requested to require the examination of this witness by the district attorney to be so conducted as to elicit direct answers. The court refused to regulate the examination of the witness, but instructed him to confine himself to stating facts in answer to questions propounded to him, and the court also instructed the jury to disregard any statements made by the witness which were merely the suspicions, conclusions or opinions of the witness. Notwithstanding the court's instructions to this witness,

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Opinion of the court.

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he still persisted in injecting into his testimony before the jury statements which were not evidence, and which were well calculated to prejudice the defendant in the minds of the jury. It also appears from the bill of exceptions that on a former trial of this case this same witness had testified in the same objectionable manner.

In his motion for a new trial the defendant made the conduct of this witness one of the grounds of his motion. In view of the very meagre evidence in the case tending to prove defendant's guilt, it is very probable that the illegal statements made by this witness, evincing, as he did, his conviction of defendant's guilt, influenced the jury in their verdict. The court, we think, was altogether too lenient with this witness. When he persisted in putting before the jury his suspicions, conclusions and prejudices against the defendant, after repeated requests and instructions not to do so, he should have been fined for contempt, and, if need be, imprisoned.

As to the inculpatory facts proven against the defendant, they are very few and of a very uncertain and unsatisfactory character. Tracks similar to his were discovered at the place where the money was lost, and these tracks were followed to his gate. These tracks, in connection with the witness Tabor's suspicions and conclusions, constitute the case of the State. No other facts, except as to the tracks, were proved by the State, which are entitled to be regarded as inculpatory, and the proof as to the identity of the tracks found with those made by the defendant is by no means certain. In our opinion, the evidence, even when supplemented with the witness Tabor's suspicions and opinions, is insufficient to exclude every other reasonable hypothesis than that of defendant's guilt.

We think the court erred in not granting the defendant a new trial, and for this error the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered May 28, 1884.

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Opinion of the court.

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[No. 3115.]

**LEM STANDFORD v. THE STATE.**

1. **UNLAWFUL SALE OF LIQUORS—CHARGE OF THE COURT.**—A single sale of intoxicating liquors does not of itself constitute pursuing or following the occupation of a liquor dealer within the purview of Article 110 of the Penal Code, and in charging that it does the trial court erred.
2. **SAME—INTERPRETATION OF A STATUTE.**—It is not the sale, but the following of the occupation of selling of intoxicating liquors without having first obtained license, that is the gravamen of the offense denounced by the statute of this State.
3. **SAME—FACT CASE.**—See the statement of the case for evidence *held* insufficient to support a conviction for unlawfully pursuing the occupation of a liquor dealer.

**APPEAL** from the County Court of Bosque. Tried below before the Hon. R. G. Childress, County Judge.

The information charged the unlicensed sale of intoxicating liquors in quantities of one quart. The appellant was convicted and fined in the sum of three hundred dollars.

An agreed statement of facts disclosed that appellant was a farmer residing in Coryell county; that he had never followed the occupation of selling liquor; that, on the day alleged in the information, he sold four bottles of medicated bitters; that said bitters was an intoxicant when drunk in sufficient quantities, and that the proper authorities had levied a tax for following the occupation of selling intoxicating liquors in Bosque county.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** Defendant was convicted upon an information charging him with pursuing the occupation of selling intoxicating liquors in quantities of one quart, without first obtaining a license therefor, said occupation being taxable, etc. The evidence proved that he sold four bottles of *medicated bitters* on the same day, and had never sold, or offered to sell, any other liquors within the knowledge of the witnesses; that the bitters

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Opinion of the court.

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sold were intoxicating liquors; that defendant resided in Coryell county, and was by occupation a farmer.

The court charged the jury, in effect, that the defendant had violated the law; that a single sale of intoxicating liquors constituted the offense charged. We think this was error. This information is brought under Article 110 of the Penal Code, which reads: "Any person who shall pursue or follow any occupation, calling or profession, or do any act taxable by law, without first obtaining a license therefor, shall be fined," etc. A single sale of intoxicating liquors would not of itself constitute pursuing or following the occupation of a liquor dealer. "Occupation" as used in this statute, and as understood commonly, would signify vocation, calling, trade; the business which one principally engages in to procure a living or obtain wealth. It is not the *sale* of the liquor that constitutes this offense. It is the *engaging in the business of selling without paying the occupation tax*. It does not require even a single sale to constitute the offense, for a person may *engage in the business* without *succeeding* in it even to the extent of one sale. So, on the other hand, a person may make occasional sales of liquor without pursuing or following, or intending to pursue or follow, the occupation of selling liquor. We think the charge of the court was manifestly wrong, and we are furthermore of the opinion that the evidence fails to show that the defendant did unlawfully pursue the occupation of selling intoxicating liquors, as charged in the information. (See Acts Seventeenth Leg., pp. 21-112; *La Norris v. The State*, 13 Texas Ct. App., 33.)

If, however, on another trial, facts are proved which tend to show that the defendant had engaged in the business or occupation of selling medicated bitters, the court should submit that question to the jury, to be determined by them from all the evidence in the case. It is a question of *fact*, and not a question of *law*, as to what constitutes the pursuing or following an occupation.

Because the court erred in its charge to the jury, and because the evidence does not support the verdict, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered May 28, 1884.

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Statement of the case.

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[No. 3166.]

## JAMES BARR v. THE STATE.

## 1. PRACTICE—JURISDICTION OVER UNORGANIZED COUNTY—CASE STATED.

This offense was committed in the unorganized county of Z., when that county was by law attached to M. county for judicial purposes. The indictment was properly found in M. county. Subsequently Z. county was attached to F. county for judicial purposes, and the district court of M. county transferred the indictment to the said F. county. Before the case came on for trial in F. county, Z. county was partially organized, but its judicial autonomy was not completed, the Legislature having failed to provide times for holding the terms of the district court, and the district judge having failed to fix the same under the authority delegated to him by the act of April 25, 1882. When the case was called in F. county the defendant interposed his plea to the jurisdiction of the district court of that county, and insisted that the case should be transferred to Z. county. *Held*, that the plea was properly overruled.

2. SAME.—Irregularities in the record entry of the presentment of an indictment do not constitute cause for setting aside the indictment, or in arrest of judgment. Such matters should be mooted by suggestion *in limine* to the court wherein the indictment was presented, and are not available in a different forum to which the venue has been changed.

APPEAL from the District Court of Frio. Tried below before the Hon. D. P. Marr.

The indictment in this case was joint against the appellant and Albert Perkins, and charged them with the theft of two horses, the property of N. A. Brice, in Zavalla county, Texas, on the second day of September, 1880. The appellant being alone upon his trial, was convicted, and his punishment was assessed at five years in the penitentiary.

The substance of the testimony of N. A. Brice was that his two certain horses which he described by flesh marks, brands, etc., were taken from his possession about the time charged in the indictment. He failed to find them after diligent search, but after some days he received information from William Smith, a resident of Frio county, that the two horses, known to Smith as belonging to him, witness, were taken by his house in the direction of San Antonio. Witness followed, but failed to find horses or thieves. He gave descriptions of his horses to various parties along the route, and returned home.

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Opinion of the court.

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William Smith testified, in substance, that he saw the said two horses, which he knew, in the possession of two young men whom he did not know. He could not identify the defendant.

Felix Roberson testified, in substance, that shortly after Mr. Brice gave him a complete description of the horses stolen, he saw the defendant in possession of one of them. The defendant claimed to own the animal and the brand, which had recently been changed slightly by picking, and offered to trade the animal to the witness. The brand, before being changed, was clearly the Brice brand; the flesh marks corresponded, as did the color, etc., with those given by Brice.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. On the second day of September, 1880, when the offense was committed, Zavalla county, in which it was committed, was an unorganized county, and was attached, for judicial purposes, to the organized county of Maverick, in which latter county the indictment was properly found. By subsequent act of the Legislature, Zavalla county was attached, for judicial purposes, to Frio county, and the district court of Maverick ordered the transfer of the case for trial to Frio county. Before the trial came on in Frio, steps had been taken to organize Zavalla county, and a partial organization had been effected; but its autonomy was not complete for judicial purposes, the Legislature having made no provision nor passed any act providing for the holding any terms of the district court in said county; nor had the district judge fixed the time for holding the courts in Zavalla county under the provisions of the act of April 25, 1882 (General Laws, called session of the Seventeenth Legislature, page 4), authorizing district judges to fix times for holding courts in newly organized counties. When the case was called for trial, defendant, by plea to the jurisdiction, insisted that the case was properly and legally triable alone in Zavalla, and that the district court of Frio had no longer jurisdiction over it; and he moved to have the cause transferred to Zavalla county.

This plea and motion were overruled by the court, and, as part of the record, and incorporated into it, we find in full the conclusions of fact as ascertained and found by the judge, and



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Opinion of the court.

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his conclusions of law based upon the facts. It is a most able and admirable exposition of the law applicable to the question. We take this occasion to commend the practice, in criminal cases, of finding the facts and giving the conclusions of law upon such questions, as a great aid to this court in its adjudication upon them. In his conclusions of law, the learned judge makes an able argument against the constitutionality of the act of the called session of the Seventeenth Legislature, *supra*, conferring authority upon district judges to fix times for holding courts in the newly organized counties in their districts. This question we do not deem it necessary to decide in this case. Aside from its consideration, the other reasons given by the learned judge are ample for the support of the jurisdiction of Frio county, and it was not error so to hold.

After this plea to the jurisdiction was overruled, defendant presented a second plea to the jurisdiction, upon the ground that neither the order of the district court of Maverick county transferring the cause, nor the transcript accompanying the record, shows "that the indictment was found by a grand jury of Maverick county, or that nine of their number concurred in finding the bill of indictment; and the pretended order does not show that there was any court held at the time when the indictment was presented," etc. This plea was also properly overruled. "Irregularities in the record entry of the presentment of an indictment do not constitute cause for setting aside the indictment, or in arrest of judgment. Such matters should be mooted by suggestion *in limine* to the court wherein the indictment was presented, and are not available in a different forum to which the venue has been changed." (*Loggins v. The State*, 8 Texas Ct. App., 434; *Dodd v. The State*, 10 Texas Ct. App., 370.)

There is no other question in the case requiring discussion, and no error in the record for which the judgment should be reversed, wherefore it is affirmed.

: Affirmed.

Opinion delivered May 28, 1884.

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Statement of the case.

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[No. 3158.]

**E. F. DAVIDSON v. THE STATE**

1. **ESTABLISHMENT OF PUBLIC ROADS.**—The mode and manner by which public roads are established is prescribed by statute. (Revised Statutes, Articles 4359 to 4390, inclusive.) One of the prerequisites is that the jurors appointed to lay out the road shall, before proceeding to act as such, take the oath prescribed by statute. (Revised Statutes, Article 4386.)
2. **SAME—CONDEMNATION OF PRIVATE PROPERTY TO PUBLIC USE.**—The rule is well established that, in order to condemn private property to public uses, the law authorizing and directing it must be strictly observed and pursued, and the performance of what the law requires is a condition precedent to the authority to condemn. A public road cannot be laid out and established without the requirements of the law in such cases having first been complied with.
3. **SAME—OATH—CHARGE OF THE COURT.**—Where proceedings are summary, and a court proposes to exercise extraordinary power, under a special statute prescribing its course, that course must be exactly observed. The statutory oath, which is a necessary prerequisite to the validity of the action of a jury in laying out a public road, was never taken by the jury in this case. Wherefore see the statement of the case for a requested charge on the subject which the trial court erroneously refused to give.
4. **SAME—FACT CASE.**—See evidence *held* insufficient to support a conviction for obstructing a public road.

**APPEAL** from the County Court of Falls. Tried below before the Hon. E. C. Stuart, County Judge.

The information charged the appellant with the offense of wilfully obstructing a public road in Falls county. A fine of fifty dollars was imposed by a verdict of guilty.

W. H. C. Lee was the first witness introduced by the State. He testified that he was the overseer of the road leading from White Rock crossing to the Bell county line, in Falls county, Texas. The defendant Davidson lives on and owns the William Lawrence survey of six hundred and forty acres, in Falls county. Within the last few days preceding this trial, and since the filing of the information herein, the witness, as road overseer, has marked the road along the line of said Lawrence survey, so as to place the line of the survey in the centre of the road. "That is fifteen feet of the road so designated, a wire fence running along in and with the road, the fence being on the Lawrence

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Statement of the case.

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survey, about two hundred yards in length. This fence was put there by the defendant after the passage of the two orders of the county commissioners' court, hereinafter mentioned."

At the time that the defendant constructed that fence no road had been marked on the ground along the line of the Lawrence survey, but the commissioners' court had already passed the orders referred to. Previous to that time the road had run on straight through the Bierly survey, and after the change, or the passage of the said orders by the commissioners' court, the public travel had adhered to the old route, or gone through the prairie (the whole country being open), there being no kind of mark along the line of the Lawrence survey indicating a road until the witness had marked it a few days ago, since the institution of this prosecution, the fence having already been constructed. Witness marked the road thirty feet wide, fifteen feet on each side of the line of the Lawrence survey. This placed the fence near the centre of the road. The witness was a member of the commissioners' court, and remembers that the defendant was present when the report of the jury of review was before the court, and when the court entered its order approving the report, changing the said road so as to run north thirty degrees west, with the Lawrence survey, instead of straight on through the Bierly survey, and the defendant was asked if he had any objection to the report and order, and he replied that he had none. If the west line of the Lawrence survey is in the middle of the road mentioned in the indictment, then the fence is an obstruction. Plat was here exhibited showing the location of the road before it was changed. The order of change removed the road from its course over the Bierly survey to run with the Lawrence, north thirty degrees west. The object of the change was to place the road on better ground, to change it from running through land of Robert Rucker, John Buckholt, and other Germans, who bought on the Bierly survey when the road was running through it, and place the road on land lines.

J. W. Watkins, the next witness for the State, testified that he was the clerk of the county court of Falls county, Texas. Witness had been unable to find the application to the commissioners' court of Falls county to change the road running from White Rock crossing on Pond creek to the Bell county line, from its course across the Bierly survey, to its course N. 30 W. with the Lawrence survey. Witness, however, must have had such an

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Statement of the case.

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application before him, else he could not have formulated the order. Witness had diligently searched for such application in his office. He could not remember who signed it, nor how many signers there were to it (the application or petition), and could not now state the contents of that document, but supposes that an order followed it. Witness remembered that he saw the application, and that it was signed by more than one person.

The State then read in evidence from the records of the commissioners' court the following order appointing a jury of view on said road from White Rock crossing of Pond creek to the Bell county line. It appears on page 128 of the minutes of the commissioners' court, and reads as follows:

"On this twelfth day of February, 1883, came on to be heard the application of sundry citizens of Falls county for a change in said road, commencing at White Rock crossing on Pond creek and ending at Bell county line, as follows: Commencing at Cottonwood spring, on the west line of the Lawrence survey, to run north about two hundred yards, thence west to the Cameron and Waco road, thence southwest on the line between Buckholt and J. M. Berry to the Bell county line. It is ordered by the court that Henry Hale, L. B. Scott, E. N. May, John Hale and John Buckholt be, and they are hereby, appointed a jury of view to mark out said change in accordance with said petition, and report their action to the next term of this court."

The order of said court, approving said report and ordering the opening of the said road, appears on page 204 of the minutes, and reads as follows:

"On this, the fifteenth day of May, 1883, came on to be heard the report of the jury of view appointed at a former term of this court to mark out a change in the road from White Rock crossing on Pond creek to the Bell county line. The said report reads as follows: 'Commencing at White Rock crossing road, thence N. 30 W. with the Lawrence survey to N. E. corner of a survey for S. J. Rollowitz out of Bierly survey; thence west to the division line of the Bierly survey; thence with the division line to the corner between Buckholt's north line to the west line of the Bierly survey; thence north to the N. E. corner of M. Hunt survey; thence W. to the Bell county line.' Said report having been heard, and no protest having been filed, it was ordered by the court that the report be adopted, and the overseer of said road is ordered to open said road in conformity to this report."

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Statement of the case.

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John Buckholt was the next witness who was called and testified for the State. He stated that as the line of the Lawrence survey was located, or ascertained by a survey made by the county surveyor some three years before this trial, the defendant's fence mentioned by the witness Lee would be two feet over on the Bierly survey. Witness was one of the jury of view on the said change of the White Rock crossing and the Bell county line road, from its course across the Bierly survey (and over witness's land) to the course with the Lawrence survey N. 30 W. Only three of the jury signed the report. The jury made no marks on the ground designating the road. They took no oath on entering upon their duties. After discharging the duty imposed upon them by their appointment, three of the jury went before J. M. Killen, justice of the peace, wrote out and signed and were qualified to their report. Witness did not know what was the form or substance of the oath they took on signing their report. This was the only oath the members of the jury took during the proceedings. This road was the same one that was mentioned in the indictment. Witness knew that the defendant put up such a fence as was mentioned by the witness Lee, and at the time stated by Lee.

The State was permitted, over the objection of the defense, to read in evidence the following report:

"THE STATE OF TEXAS, }  
"COUNTY OF FALLS. }

"We, the undersigned, jury of review appointed by the commissioners' court at Marlin, Falls county, Texas, at the February term of said court, to change a road from the west line of the Lawrence survey on White Rock crossing road to the Bell county line, commencing at the White Rock crossing road, thence N. 30 W. with the Lawrence survey to the N. E. corner of a survey for A. J. Rollowitz out of the Bierly survey; thence north with the division line to the corner between Buckholt and Berry; thence west with Buckholt's north line to the west line of the Bierly survey; thence north to the northeast corner of the Memican Hunt survey; thence west to the Bell county line. Hoping the above report sufficient, we remain,

"Your obedient servants,

"J. G. BUCKHOLT,

"L. B. SCOTT,

"J. H. HALE,

"Reviewers.

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Opinion of the court.

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"Sworn to and subscribed before me, this April 30, 1883.

"J. M. KILLEY, J. P."

The substance of the testimony of the witness Lee was repeated by three other witnesses.

The charge of the court requested by the defendant and refused by the court, which is the subject matter of ruling embraced in the third head note of this report, reads as follows:

"The defendant requested the court to instruct the jury that the jury, or a majority of them, who are appointed to lay out and mark the road are required by law to take, before entering on their duties, an oath, in substance, that they and each of them will lay out the road by the order to them directed from the commissioners' court, according to law, without favor or affection, malice or hatred, to the best of their skill and knowledge; and in this case if the jury believe that such an oath was not taken by said jury of view, or a majority of them, before acting in the performance of their duties, you will find the defendant not guilty."

The motion for new trial presented the questions considered in the opinion.

*Goodrich & Clarkson*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. This appeal is from a judgment of conviction for obstructing a public road.

The mode and manner by which public roads are established in this State are prescribed by statute. (Rev. Stats., Arts. 4359 to 4390, inclusive.) One of the prerequisites is that the jurors appointed to lay out the road shall, before proceeding to act as such, take the oath prescribed by the statute. (Rev. Stats., Art. 4368.) The rule is well established that, in order to condemn private property to public uses, the law authorizing and directing it must be strictly observed and pursued, and the doing of what the law requires is a condition precedent to the authority to condemn. (White & Willson's Cond. Cases, sec. 393.) A public road cannot be laid out and established without the requirements of the law in such cases having been first complied with. (*Floyd v. Turner*, 23 Texas, 292.)

In this case the jurors appointed to lay out the road did not

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Syllabus.

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take the statutory oath before acting in the premises, nor did they ever take that particular oath. This oath was an essential prerequisite to the validity of their action. Where proceedings are summary, and a court proposes to exercise an extraordinary power under a special statute prescribing its course, that course ought to be exactly observed. (*Mitchell v. Runkle*, 25 Texas Supp., 132.) The court erred in refusing to give to the jury the special requested instruction asked on this point by defendant.

Conceding, however, for the sake of argument, that the oath had been properly taken by said jury, and we would still consider the evidence as insufficient to support the judgment. It is testified by the witness Lee, the road overseer, that the obstruction complained of was "a wire fence running along and in and with the road, the fence being on the Lawrence survey, about two hundred yards in length." This Lawrence survey belonged to and was owned by appellant. The report of the jury appointed to locate and lay out the road was as follows, viz: "Commencing at White Rock crossing, thence north 30 degrees west, with Lawrence survey to northeast corner of survey for S. J. Rollowitz, out of Bierly survey; thence west," etc.

Now, if appellant's fence was, as the witness Lee stated, on the Lawrence survey, it could not have been in a road running north 30 degrees west with the line of that survey.

Because of error in the charge of the court, and because the evidence is insufficient, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 28, 1884.

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[No. 3130.]

WILLIAM COOPER *alias* JOHN JACKSON v. THE STATE.

1. PRACTICE—CHARGE OF THE COURT—CIRCUMSTANTIAL EVIDENCE.—  
When the inculpatory evidence is purely circumstantial, it is the imperative duty of the court to give in charge the law controlling such evidence.
2. CONTINUANCE—NEW TRIAL.—Note a state of case wherein a continuance

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Statement of the case.

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having been refused, the court, in view of the evidence adduced, should have granted a new trial.

APPEAL from the District Court of Falls. Tried below before the Hon. B. W. Rimes.

The indictment charged the appellant with the theft of a horse, the property of Harry Stuart, in Falls county, Texas, on the twenty-third day of December, 1883. His trial resulted in his conviction, and his punishment was assessed at a term of fifteen years in the penitentiary.

Harry Stuart was the first witness for the State. He testified that on the night of December 23, 1883, he tied his mare with a long, large sized rope to his crib, which stood inside of his lot, and last saw her on that night between nine and ten o'clock. She was then securely tied to the crib. Next morning she was gone. Witness tracked her, and followed the trail made by dragging the rope, in different directions about a mile, at which point she got into the road leading from witness's house to Reagan. At this road the witness abandoned the search, and offered a reward for her recovery. Witness recovered the animal through the agency of W. P. Marlin and Mr. Johnson a few days later. The mare was a large bay animal, branded N E P on the thigh and F 6 on the shoulder. The witness was quite well satisfied that the defendant knew the mare, as he had often seen the witness riding her. Defendant lived on the Davis place, about one and a half miles distant from Reagan, in a direction from Reagan other than that in which witness lived. The trail of the mare, when witness last saw it, was not going in the direction of the Davis place where defendant lived, nor would she have approached the defendant's residence any nearer than where she entered the road, if she followed the road. Witness had not seen the defendant for a week or more prior to the loss of the mare. Witness saw no other than the mare's tracks on her trail, nor did he find any other tracks about the crib where the animal was tied. Witness tied the rope in a hard knot, and as there was nothing to show that the animal had broken loose, the witness was of impression that the rope was untied by some person. The mare was the property of the witness, was worth about sixty-five dollars, and was taken in Falls county, Texas, on the night of December 23, 1883, without the consent of the witness.

Alfred Gillum was the next witness for the State. He testified,



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Statement of the case.

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that for ten years past he had resided in Robertson county, about one and a quarter miles from the town of Calvert. The witness saw the defendant on Monday, December 24, 1883. At about ten o'clock on that morning the defendant passed witness's house, riding the mare for theft of which he was now on trial. He was going in the direction of Calvert. The witness mounted his own horse just as defendant passed, and the two rode together into the town of Calvert. En route the defendant told witness that he was going to Hearne after a mule. The witness proposed to trade for the mare, and between three and four o'clock that evening the defendant returned to the witness's house with the mare, and a trade was effected, the witness giving the defendant two colts and twelve dollars in money for the animal. The defendant, at the time of the trade, told the witness that he got the animal from Mr. Ward, the sheriff of Falls county, and that he, the defendant, lived on Ward's place, five miles northwest from the town of Marlin. He gave the witness a bill of sale to the mare, the witness writing the same and signing defendant's name to it. This trade was made in the presence of a hired man, then on the witness's place, but who had since gone. Witness identified the defendant, and was absolutely positive that he was the man who sold him the mare in question, at the time and place, and in the manner stated. If the defendant was at Bremond on that day, and took the train for Calvert on that day, it would have been impossible for the witness to have seen him at the time and place that he did, on account of the distance and the time of day. But he could not have been at Bremond and taken the train to Calvert on that day. The witness was absolutely certain that the defendant was the man who rode with him into Calvert in the morning, and returned and sold him the mare in the evening. Witness identified him when he was first arrested in Calvert, and again at the examining trial before Justice T. G. Fountain. The witness's house was situated about fourteen miles from Bremond, and the train going from Bremond to Calvert passes Bremond about eleven o'clock in the morning. The witness never saw the defendant prior to the said twenty-fourth day of December. Here the bill of sale, bearing date December 25, 1883, was exhibited and read in evidence. Witness did not know how it came about that the bill of sale was dated December 25, except that it occurred by clerical mistake. He knew that the

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Opinion of the court.

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bill of sale was written by himself, and executed by the defendant on December 24, 1883. The bill was signed thus:

"JOHN <sup>his</sup> × JACSON."  
mark

John Ward, sheriff of Falls county, Texas, was the next witness for the State. He testified that he did not sell the defendant the mare in question. The defendant did not live on the witness's place. Witness knew nothing about him, and saw him for the first time, to know him, after his arrest on this charge.

W. P. Marlin, deputy sheriff of Falls county, testified, for the State, that he arrested the defendant at Calvert, Robertson county. The witness heard that the stolen mare was at Mr. Gillum's place, near Calvert, and, late one evening, went there to see about it. He described the mare to Mr. Gillum, who told witness that the mare was in the field, and could not be caught that night, but that he would bring her in next morning. Mr. Gillum did bring the animal in, as he promised, and delivered her to witness. Harry Stuart offered a reward for the recovery of the animal, and, as stated, she was recovered by the witness. Witness was aided in the arrest of defendant by Mr. Johnson, of Calvert. Defendant was brought, in arrest, to Reagan on Friday, December 28, 1883.

Witness knew the mare in question, and knew that she belonged to Mr. Harry Stuart. Alfred Gillum went to the calaboose in Calvert, and there saw and identified the defendant as the party who sold him the mare. Witness delivered the mare to Mr. Harry Stuart. The distance between the residences of Harry Stuart and Mr. Gillum is about sixteen miles.

The motion for new trial raised the questions involved in the opinion.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. As made by the record the case was one wholly of circumstantial evidence, and the court failed to instruct the jury as to that character of evidence. Under oft-repeated decisions, such failure in the charge in a felony case is fundamental error.

Defendant's application for continuance was to enable him to

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Syllabus.

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procure the testimony of two witnesses by whom he expected to prove that, on the day of the alleged sale of the stolen animal to the prosecuting witness Gillum, he went to Bremond and left on the train going toward Calvert. There is no question of diligence raised as to this application. Defendant was identified as the thief alone by Gillum, who had never known him before, and who testified: "If defendant was at Bremond and took the train that day for Calvert, then on account of the distance, and because of the time of the day I saw him in the morning, it would have been impossible for him to have been at the place I saw him, and at the time I saw him." Gillum says he traded for the mare, giving defendant for her two colts and twelve dollars difference in money. Had the prosecution shown that these colts were subsequently seen in possession of, or that they had been disposed of by defendant, this might have been conclusive of the question of defendant's identity. Under the evidence, however, we think that the court should have granted the new trial, when the proposed testimony of the absent witnesses is considered in connection with it.

The judgment is reversed and cause remanded for a new trial.

*Reversed and remanded.*

Opinion delivered May 28, 1884.

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[No. 3169.]

## W. T. STALLWORTH v. THE STATE.

16	345
38	303

1. "LOCAL OPTION" LAW—INDICTMENT.—The Legislature had no constitutional authority to prohibit the gift of intoxicating liquors, nor to empower localities to do so by means of the local option law; wherefore an indictment charging a mere gift of liquor is insufficient to charge any offense.
2. SAME.—Even when a sham gift but a real sale of the intoxicating liquor is charged as the gravamen of the offense, to be sufficient, the indictment must charge that the gift was made "with the purpose of evading the law."
3. SAME—EVIDENCE.—Upon questions arising upon the admission of evidence, see *Boone's case*, 10 Texas Court of Appeals, 418; *Prather's case*, 13 Id., 401; *Akin's case*, 14 Id., 143.

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Opinion of the court.

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APPEAL from the County Court of Falls. Tried below before the Hon. E. C. Stuart, County Judge.

The indictment in this case was transferred from the district to the county court. It charged the appellant with giving away intoxicating liquors in precinct number seven, of Falls county. A verdict of guilty was returned against the appellant, assessing his punishment at a fine of twenty-five dollars.

The questions involved in the rulings of this court were presented below in the motion for new trial.

*Goodrich & Clarkson*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. This prosecution and conviction were for "giving away one drink of intoxicating liquor in a precinct where 'local option' had been adopted." Under the decision of this court in *Holley v. The State*, 14 Texas Court of Appeals, 505, the indictment states no offense, the Legislature having no authority under the Constitution to prohibit the gift of intoxicating liquor; and even where a sham gift (a sale in fact) is charged as the *gravamen* of the offense, it is essential that the indictment should charge that the gift was made "*with the purpose of evading the law*" (local option law). (See Judge Willson's dissenting opinion in *Holley's* case.)

The other questions submitted upon the rulings of the court in admitting the evidence objected to have heretofore been passed upon and decided adversely to the rulings, and the court was in error. (*Boone v. The State*, 10 Texas Ct. App., 418; *Prather v. The State*, 12 Texas Ct. App., 401; *Akin v. The State*, 14 Texas Ct. App., 143.)

Because the indictment charges no offense against the laws of the State, the judgment is reversed and the prosecution is dismissed.

Opinion delivered May 28, 1884.

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Statement of the case.

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[No. 3131.]

## PLEASANT ROBINSON v. THE STATE.

16	347
29	465
16	347
31	314

1. MURDER—MALICE—EVIDENCE.—As tending to show a motive for the defendant to kill the deceased it was proper to admit in evidence an affidavit charging the defendant with an offense, made by the deceased a short time before her death, and upon which a prosecution was pending at the time of that event.
2. SAME.—It was error to permit a witness to state what the deceased told her about a third party beating her nearly to death, such evidence being hearsay, and no part of the *res gesta*, and in no way connected with or bearing upon the issue of the defendant's guilt. It did not appear that what the deceased said was in explanation of her then sickness and was a part of the *res gesta* of it.
3. SAME—NEW TRIAL—FACT CASE.—See the statement of the case for evidence held insufficient to support a conviction for murder in the first degree; wherefore a new trial should have been awarded.

APPEAL from the District Court of Falls. Tried below before the Hon. B. W. Rimes.

The conviction in this case was for murder in the first degree, perpetrated upon one Jane Washington, in Falls county, Texas, on the second day of November, 1883. A life term in the penitentiary was the punishment awarded. The defendant and the deceased were both negro women.

Winnie Payne testified, for the State, in substance, that, at the time of the death of Jane Washington, on Friday, November 2, 1883, the defendant and her daughter, Nancy Glass, and Dave Warren lived together in a house on Mr. Battle's place, in sight of and in hearing distance of the house on the same place occupied by Henry and Jane Washington. The defendant and her idiotic daughter, Nancy Glass, went to Henry Washington's to wash on the fatal Friday. Before the witness got her dinner, the defendant returned and asked if witness was a good hand to keep secrets. Witness replied that she could keep secrets if they were not bad ones. Defendant replied: "You are not the woman I am looking for." Witness said to her: "You have told me secrets, and I have kept them." She replied: "Yes, you have, and I think you are a good woman. Well, don't you think that devil (meaning Henry Washington, witness's brother) hit

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Statement of the case.

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that woman over the head last night and liked to have killed her?" Witness then said: "O, Lord! did Henry do that? I am going right down to see him about it." Defendant then said: "Don't go; I was not telling you the truth; I don't know why I told you that lie." Defendant then went back toward Henry's, carrying a bundle of clothes with her.

Some time later George Ann O'Neal and Nancy Glass came to witness's house and said that Jane Washington was burned up. Witness immediately started to the house and *en route* met the defendant, who asked what witness had been told. The defendant caught witness and told her not to go to Henry's, that she would injure herself, as she was then far advanced in pregnancy. The witness, on reaching the house, found no one but Henry Washington at first, but soon discovered the deceased lying in the fire. She called to Henry to pull his wife out of the fire, but he did not do it then. Jim Freeman being called, ran into the house, and he and Henry pulled Jane out. She was dead.

During an acquaintance of fifteen or twenty years, the witness had never known the deceased to have fits. She had not, however, lived near the witness for some time until the year previous to her death. The deceased and the defendant lived in constant trouble about Henry Washington. Witness had a conversation with the defendant on the day before Jane's death. She said that Jane had filed a complaint against her at Marlin, and that they (deceased and defendant) would never meet at a trial. Witness looked hard at defendant when the remark was made, and defendant said: "You think that I am going to hit that woman, but I am not. I am going to lay in my bed and pray to God to kill her." In this same conversation defendant said that deceased had gone to Marlin and slandered her, and that if she could kerosene the deceased and burn her up without destroying Mr. Battle's house, she would do so.

Cross-examined, the witness stated that she had never observed any undue intimacy between Henry and the defendant, and had seen no conduct of theirs to justify Jane's jealousy. Henry worked land on Mr. Battle's place, and the defendant and her children were in Henry's employ. He could not have worked that land without their help. Witness's pregnancy was the reason the defendant assigned for not wishing witness to go to Henry's house at the time of Jane's death. Witness described the fire place in which the death occurred as large, and stated that she smelled nothing like kerosene.

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Statement of the case.

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George Ann O'Neal was the next witness for the State. She testified that she had known deceased as a healthy, robust woman for a long time, and had never known her subject to fits. The witness was near the house at the time deceased was burned to death. About one o'clock witness heard the defendant calling her and Buck Payne. She went to Henry Washington's house, where she saw the deceased lying dead in the fire, her clothes smoking. The defendant, Henry Washington, Nancy Glass and Dan Warren were at the house. Witness left shortly, and returned in about an hour, when she found that the body had been dragged from the fire. She met Winnie Payne when she left the first time. Winnie, being told what had happened, went to Henry Washington's house. Witness had heard the defendant and the deceased quarrel about Henry Washington. The deceased was a very jealous woman. Witness had never heard the defendant utter threats against the deceased.

Cross-examined, the witness stated that while going to the house on the first occasion mentioned (on being called), she met the defendant in the lane near the house. Defendant was then very much excited. The deceased frequently accused the defendant of improper intimacy with Henry, which the defendant invariably denied. Defendant and deceased were both women of fifty or sixty years of age. Witness heard that during the August preceding her death, the deceased fell in a faint on the road from church. She never heard of her falling on any other occasion. Jane was dead when witness first reached the house. Defendant was very much excited, and said in reply to questions: "That woman is in the fire. I did not know it until Henry opened the door and told me." The chimney was on the north side of the house. The smoke from the chimney drifted southwards. The defendant that day washed on the north side of the chimney.

The substance of the testimony of G. B. Robbins, one of the jury of inquest, was that from impressions in the ashes the body of the deceased must have lain in the fire, head first, face downwards, with her limbs extending toward the opposite door. A pot and oven stood in the right hand space of the fire place. The nose, lips and skin on the face were burned off. None of the burns extended to the hollow, but reached to the waist. A wound an inch long was discovered on the top of the head of the deceased. Some blood from the ear had evidently trickled over the cheek. The wound on the head had been dressed with

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Statement of the case.

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a rag, saturated, evidently, in sugar and turpentine. Witness saw no other wounds, smelled no kerosene, and, though he examined closely, discovered no evidence of oil about the body or the house. Nothing with which a wound could have been inflicted was found in the house save a shovel, and that had neither blood nor hair on it. The burns were sufficient in themselves to produce death.

C. A. Pruitt, a member of the coroner's jury, testified as did the last witness, except that, though not certain, he thought he detected the odor of kerosene on a small fragment of cloth which he took from under the body. He found no indications of oil about the body or premises.

Doctor Price testified, in substance, that he exhumed the body and made a *post mortem* examination of the skull, in the presence of the jury of inquest. The scalp was buried from the forehead, and there was a small laceration through the scalp on top of the head. The effect of fire and sun heat is doubtless the same, both capable of producing heatstroke. Heatstroke is most frequently very sudden, causing instantaneous loss of motion and self-control, and in cases where the patient recovers at all, the recovery is complete within a few hours. Unconsciousness and even death very frequently ensue as an instantaneous result of heatstroke, and diseases of this and like character, which result in sudden death, such as catalepsy, epilepsy, aneurism of either heart or brain, asphyxia, etc., are not usually preceded by premonitory symptoms. The witness discovered no evidence of a blow on the skull. Epilepsy, catalepsy and aneurism of the brain are generally discoverable from a *post mortem* examination of the brain. Witness did not examine deceased's brain.

Hall Taylor, another member of the coroner's jury, testified, in addition to what was stated by the previous witnesses who were members of that jury, that he positively smelled coal oil on the rag smelled by Pruitt, and that he saw a small grease spot on the floor that smelled like coal oil. He saw a four-inch wound on the head, into which he inserted his finger and found the skull broken. Lewis Maxwell, another member of the coroner's jury, testified to the same effect.

Tilda Washington, wife of Henry Washington's brother Sank, testified, in substance, that on the night before Jane's death, she, Jane, came to witness's house, near by, and asked her to bind up a small gash in her head, which she said had been inflicted by Henry. Witness bound it up next day with a rag, sugar and



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Statement of the case.

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turpentine. Witness saw the wound on the head after death. It was the same wound she had bandaged. She at no time regarded this wound serious; it was nothing more than a small gash. She was at Henry's house and saw the body after death. She smelled no coal oil, and saw no evidence of coal oil about the body or house. Defendant and Jane appeared perfectly friendly on Thursday evening before the death of the latter.

Fred. Berry testified that he had heard the deceased and defendant more than once quarrel about Henry Washington, and in one quarrel heard defendant threaten to kill deceased.

Kiah Washington, Henry's brother, testified for the State, in substance, that he was at and in the house, examined the body, and both saw and smelled coal oil on the body after death. When he remarked, after examining the body: "The Lord Jesus Christ! This woman is murdered; and furthermore, she is kerosened," Henry Washington put his hand in his pocket and said: "Shut up; I don't want such talk around here." Witness was not on good terms with his brother Henry. Neither Sank nor Sandy Washington were at Henry's house while witness was there. Some time prior to Jane's death, defendant told witness that Jane had gone to Marlin and abused her, and that she would kill Jane in less than three months.

The substance of the testimony of Peter Crutchfield, for the State, was that he passed Henry Washington's house between one and two o'clock on November 2, 1883, and saw defendant and her daughter washing some fifteen or twenty steps from the house. The house was closed. Considerable smoke was floating out of the chimney, and the witness smelled a strange odor, like rags and meat burning.

The material part of the testimony of Dick Payne, a witness for the State, was, in effect, that he occupied a portion of the house occupied by defendant. He knew that the defendant and Henry Washington were very intimate. Henry paid her attentions usually paid to a wife. Witness had never seen Henry and defendant in bed together, but had often gone to bed leaving them in defendant's room together. The defendant and deceased were constantly quarreling about Henry. Witness had heard the defendant threaten to kill the deceased. On one occasion, in May, 1883, defendant, with a hatchet and blanket, went to George Ann O'Neal's house looking for Jane. On her return she said that she wished God would provide her a dark night, that she might put on a black dress and have her aim. Witness

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Statement of the case.

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had never told this until now. Henry's attention to defendant was rather constant. Henry and the defendant had a quarrel on the day of Jane's death. Defendant came out of her house with a knife, about breakfast time, cursing Henry. She said she would do murder that day—would kill from the largest to the least.

Jesse Blocker testified, for the State, that some time before Jane's death he saw defendant standing in the road with a club in her hand, daring Jane to breathe. He remembered the occasion when Freeman brought the deceased to his house, suffering from a fit into which she had fallen on her way home from church.

Tony Grant testified, in substance, that he was at Henry Washington's house on the day that Jane was burned, and before that event took place. Jane and the defendant were in the house quarreling. He then went to Henry Washington, who was with Dave Warren in the field.

Hannah Blocker testified, in substance, that the deceased was brought to her house one day in August by Jim Freeman, having fallen in the road on her way from church. Deceased told the witness that Henry Washington had beat her nearly to death.

The complaint against the defendant made by Jane Washington, referred to in the head notes and opinion, was next introduced in evidence by the State.

The justice of the peace who presided at the inquest testified, for the defense, that he failed to detect by any means the presence of kerosene about the body or premises. The jury was divided as to whether a certain rag smelled like it had been saturated with kerosene.

Alex. Washington testified, for the defense, that he went to Henry's house with the State's witness Kiah Washington. Kiah did not go into the house at all. He merely opened the door, looked in and said: "Lord have mercy! This woman has been murdered; and, more, she has been kerosened." Jane's body was then covered with a sheet.

Davis Warren testified, for the defense, that Henry Washington visited defendant very often, but he knew of no love affair between them. Defendant and Henry had a quarrel early on the morning that deceased was burned. Witness went to the field with Henry on that morning. In about an hour's time Henry left the field, going toward his house. He was gone

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Statement of the case.

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about one hour. Haywood Douglass came into the field during Henry's absence. Henry, on his return, asked Haywood to pick cotton. In a short time Henry went across the field, he said, to get a melon. Haywood left on Henry's return. After a short time Henry and witness went to weigh cotton. Henry emptied his cotton and told witness to go and see what was the matter about the house. Witness went, found the door locked, returned and informed Henry. Henry replied: "Oh yes. I have the key." The witness and Henry went to the house together; Henry unlocked the door, and, speaking to the defendant, who was near, said: "Sister Pleasant, here is this woman in here burning up." Defendant replied: "O! O! O! You are the very man that killed her." Harry said: "You hold your peace," and pushed the defendant back as she started in the house.

The witness did not know how far across the field Henry went when he went after the melon. The cotton was too tall for him to see. He did not know what Haywood came to the field for. Tony Grant came to the field after Haywood left. When the witness first went to the door of the house, the defendant was coming in the gate, with a bundle of clothes, from the direction of Winnie Payne's. She went to the wash place in the rear, and was returning toward the door when Henry unlocked it. This was but a short time after Tony Grant came to and left the field.

James Freeman testified that, about four o'clock on a warm evening in August, the deceased fell in the road on her way home from church, the witness supposed from heat. She became perfectly helpless, but retained consciousness. Witness and Dick Payne took her to Jesse Blocker's in their arms. Witness had never known of her having another attack of the kind. Witness assisted to take the deceased out of the fire. He neither saw nor smelled coal oil. This witness corroborated Alex. Washington respecting Kiah Washington's actions and statements at the house.

Sanford Washington testified that he talked to the defendant on the night after Jane's death. The defendant protested that she was perfectly ignorant of how the burning happened.

The motion for new trial raised the questions discussed in the opinion.

*Oltorf & Holland*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

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Opinion of the court.

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WILLSON, JUDGE. 1. For the purpose of showing a motive on the part of the defendant to kill the deceased, it was not error to admit in evidence the affidavit made by deceased a short time before her death, charging the defendant with a violation of law, which affidavit was made for the purpose of having said defendant arrested and tried for said violation, and was pending at the time of deceased's death. (*Taylor v. The State*, 14 Texas Ct. App., 340; *Rucker v. The State*, 7 Texas Ct. App., 549.)

2. It was error to permit the witness Hannah Blocker to state what the deceased told her concerning Henry Washington's beating her nearly to death. This was hearsay, and was no part of the *res gestæ*, and in no way connected with or bearing upon the issue of defendant's guilt. It does not appear that what deceased said was in explanation of her then sickness, and was a part of the *res gestæ* of such sickness. (*Hammel v. The State*, 14 Texas Ct. App., 326.)

3. It is not claimed by appellant's counsel that the court erred in its charge to the jury, or in refusing special instructions requested by the defendant. We have, however, examined the charge of the court and the special instructions which were refused, and we are unable to see that any error has been committed in giving to the jury the law of the case. We think the charge given was correct, and contained all the law applicable to the evidence, and this seems to be conceded by appellant's counsel, as they have not directed the attention of this court to any supposed defect in the same.

4. Appellant's counsel rely for a reversal of the judgment mainly upon the ground that the verdict of the jury is not supported by the evidence. We have given to the statement of facts a most careful consideration, and we are clearly of the opinion that the evidence is insufficient to support the conviction. We will not recite the evidence, as the Reporter will collate and publish the same in connection with this opinion. It is not shown by the evidence certainly, and beyond a reasonable doubt, that deceased came to her death by the criminal act or agency of any one. There were no marks of violence upon her person, except those produced by the fire, and an old wound on the top of the head, which was shown to have been made some time prior to her death. There were no indications in the house of a struggle having taken place—in fact, no signs or evidences whatever that violence had been used upon the deceased. Deceased made no outcry that was heard, and no un-

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Opinion of the court.

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usual noise was heard at or about the house at the time of her death; and yet there were several persons within hearing of the place of her death at the time. She was a woman who weighed one hundred and thirty or one hundred and forty pounds, and was apparently in good health. It is not reasonable to conclude that she could have been murdered without a struggle or an outcry on her part, and without the least evidence of violence being left upon her person.

It was the theory of the prosecution that kerosene oil was thrown upon her, and that she was then thrown into the fire and burned to death. While it is possible that this theory is correct, it is not established by the evidence, but, on the contrary, to our minds the evidence renders it improbable that her death was thus produced. There was but little fire in the fire place, but one chunk of fire, as some of the witnesses testify; there were no indications in or about the fire place of a struggle; a pot and a skillet, containing food which was being cooked, were in the fire place, and were undisturbed. No kerosene oil was found about the house, though some of the witnesses testified that they smelled it, and one witness said he saw some on the floor. Other witnesses, however, testified that they examined closely and saw no oil upon the floor, and could smell none about the body. But, it is said, perhaps she was killed, or nearly killed, and then saturated with oil and placed in the fire. If such had been the case, it is reasonable to suppose that if external violence sufficient to kill or render her helpless had been used, some evidence of such violence would have been found upon her dead body, and the testimony is conclusive that no such evidences were found then, nor subsequently, when the dead body was exhumed and particularly examined by an expert for the purpose of discovering indications of violence.

On the other hand, it appears from the evidence of a physician who testified in the case, that there are various diseases, and some of which are not infrequent, that produce death or unconsciousness suddenly, without any premonition. Among these he mentions heatstroke, catalepsy, epilepsy, hemiplegia, asphyxia, aneurism of the heart or brain. Would it not be as reasonable to suppose that the deceased was suddenly stricken down by some one of these diseases, and fell upon the fire, as to conclude from the evidence that she was murdered by the defendant or any other person? Would not this supposition, that her death was thus naturally produced, account for the absence

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Opinion of the court.

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of all external evidences of violence inflicted upon her? And is not this theory perfectly consistent with the innocence of the defendant? Is there anything unreasonable in such a theory? In connection with this hypothesis, it is worthy of notice and consideration that, in August previous to the death of deceased in November, while she was returning home from church, she suddenly fell in the road, helpless and unconscious, and in this condition was conveyed to a house near by, where she was attended to, and in a little while restored to health. This sudden attack was at the time supposed by those who witnessed it to be heatstroke, the weather at that time being very warm. Might she not on the occasion of her death have been again heatstricken? Her death occurred near midday, and while she was apparently engaged in cooking over the fire, and the physician who testified in the case informs us that fire, as well as the heat of the sun, may produce heatstroke.

Giving to the evidence before us full credit and weight, admitting as true every portion of the State's evidence, we think it falls far short of establishing with that degree of certainty which the law demands that the deceased came to her death by violence inflicted upon her by another. And it further falls far short of proving that if such violence was inflicted it was inflicted by the act or agency of the defendant. In short, we are of the opinion that the evidence, instead of clearly and satisfactorily establishing the *corpus delicti*, leaves it in great doubt and uncertainty, and is altogether too uncertain and inconclusive to warrant this conviction. (*Lovelady v. The State*, 14 Texas Ct. App., 545; *Walker v. The State*, Id., 609.)

We think the court erred in refusing to grant the defendant's motion for a new trial, and because of such error the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 28, 1884.

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Statement of the case.

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[No. 2897.]

## CORA McMAHON v. THE STATE.

1. EVIDENCE—PRACTICE.—It is a rule of evidence that all the circumstances of a transaction may be submitted to the jury, provided they afford any fair presumption or inference as to the matter in issue. See the opinion and the statement of the case for evidence *held* admissible under this rule.
2. FACT CASE.—See evidence sufficient to sustain a conviction for aggravated assault.

APPEAL from the District Court of McLennan. Tried below before the Hon. B. W. Rimes.

The indictment charged the appellant with an assault with intent to murder one William Wright, in McLennan county, Texas, on the eighteenth day of January, 1883. She was convicted of aggravated assault, and her punishment was affixed at a fine of two hundred and fifty dollars.

Garland DeGraffenried was the first witness for the State. He testified that he, Will Wright and W. E. Jackson went to a dance at the defendant's house, in Waco, on the night of January 18, 1883. While witness was sitting near a stove in the house, a negro named Houston, who was sitting near him, asked why he did not dance. Witness replied that he had been dancing. After some further exchange of words Houston called witness a d—d liar, and struck him in the face, knocking him back against the wall and stunning him for a moment. Recovering, the witness attempted to draw his pistol, but was prevented by Jackson. Houston covered witness with his pistol, telling witness that he would fire if witness drew a weapon. Houston then told another negro to bring his gun. The negro started, but was stopped by Wright, who said that the matter could be settled without a difficulty. Witness was then struggling with Jackson for possession of his pistol. About that time Wright came up behind witness and disarmed him. Witness and Wright had got to or near the door when the defendant entered the room with a shot gun, which she gave to Houston. Witness and Jackson then went out at the door, with Wright just behind them. Houston followed with the gun, and struck

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Statement of the case.

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Wright on the shoulder just as he was passing out of the door. Wright, who still had witness's pistol, turned as he was struck, caught the gun by the muzzle, and he and Houston fired at or about the same instant of time. Wright fired a second shot as Houston was falling. Witness did not know where Houston was struck. Wright was shot in the shoulder and breast with small shot. Witness's pistol was a large forty-five calibre Colt's improved revolver. Houston ridiculed witness before the difficulty, calling him a "kid," and accusing him of parting his hair in the middle. Defendant also laughed at the witness.

Cross-examined, the witness stated that he came to Waco from Durango, Falls county, on the day of the difficulty. He, Jackson and Wright took the train at Lorena together. They took no drinks until they got to Waco. They took one drink before supper, and one at the defendant's house, and no more.

W. E. Jackson's testimony did not vary materially from DeGraffenried's. His attention was first attracted to a difficulty by hearing something like a blow. When he turned he saw Houston standing with his pistol drawn on DeGraffenried, and the latter trying to draw his. Witness told Houston not to shoot, and commenced his effort to prevent DeGraffenried from drawing his pistol. DeGraffenried said, struggling hard to get his pistol: "The d—d nigger struck me, and I will kill him." Houston kept his pistol presented, and seemed to be trying to fire over witness's shoulder. He said that he would kill DeGraffenried if the latter drew a weapon. About that time Houston told a negro to bring the gun. Wright interfered with the negro, saying he was for peace. The defendant then spoke up, saying she would get the gun. Witness continued to hold DeGraffenried, the two working toward the door, and Houston following with his pistol drawn, threatening to kill DeGraffenried if he drew his pistol. Wright disarmed DeGraffenried from behind, and said to Houston: "Now, you would not shoot an unarmed man." Defendant just at this time gave Houston the gun. Witness and Wright passed out. The shooting and attendant circumstances were narrated as they had been by DeGraffenried. When Houston struck Wright with the gun, the defendant was standing near and told Houston that she would see him out.

The testimony of William Wright was substantially the same as that of W. E. Jackson. At this point the State closed.

Hattie Taylor was the first witness for the defendant. She corroborated the narratives of the State's witnesses up to the ap-



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Statement of the case.

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pearance of the defendant with the gun, except that she said nothing about Houston calling for the gun, or defendant saying that she would get it. When Houston saw defendant with the gun, he ran to her, grasped the gun, and by the use of considerable force, managed to wrench it from her hands. Houston, having secured the gun, started toward the door where Wright was standing. Defendant caught Houston by the coat tail and told him not to go outside of the house with the gun, but to remain inside with it and defend her and her property. As Houston approached the door he struck at DeGraffenried with the gun. Wright caught the gun, and two shots, one from Wright's pistol and one from Houston's gun, were fired almost the same instant, the pistol firing first. Houston was shot through the heart and killed. Witness ran out of the room when the difficulty began, but stopped in a position where she could see and hear, through an open window, all that transpired. Houston was a musician in the employ of the defendant.

Gus Gurley, another musician in the employ of the defendant, corroborated the statement of Hattie Taylor up to the point when defendant told Houston not to leave the room, but to remain and defend himself and her possessions. He testified nothing as to what subsequently transpired.

W. W. Evans testified for the State, in rebuttal, that on the morning after the difficulty he held an inquest over the body of Houston. Cora McMahon testified before the inquest that at the time of the difficulty she brought the gun into the dance hall. She did not testify that she gave it to Houston.

It was agreed by counsel that the following testimony was also made in the trial: "That, being wounded in the left breast by the shot from Houston's gun, Wright was confined to his bed for months, and was sick two months longer; that during the difficulty the defendant cursed and swore at Wright, Jackson and DeGraffenried, 'charged around,' and that when she handed the gun to Houston she said: 'I'll be with you,' advanced to the door and said: 'I'll stand by you,' and stopped in the door, holding in her hand the pistol thrown down by Houston, which, however, she made no attempt to use; that the boys, Wright, Jackson and DeGraffenried had but one pistol between them, which belonged to the latter; that the house belonged to the defendant, and was a bawdy house."

In addition to the question considered in the opinion of the

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Opinion of the court.

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court, the motion for new trial complained that the charge of the court was erroneous in several particulars.

*J. M. Johnson and F. M. Makeig*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Objection was made to the questions asked and answers given by the witness DeGraffenried as to "what occurred between DeGraffenried and deceased, Houston, at the commencement of the difficulty." It is insisted that "it was error to permit the questions and answers, because the immediate difficulty between Houston and DeGraffenried, and the conduct of appellant McMahon, had no present connection with nor reached the subsequent rencounter between Houston and Wright. That there should have been some proof first connecting Houston, Wright and appellant at and with the commencement of the *original* difficulty, or some *intentional* act to bring the first in harmony with the last rencounter."

Appellant was charged with an assault with intent to murder Wright, and it is claimed that all she did and said of an inculpatory character was said and done before Wright became a participant in the difficulty, and that the prosecution should be more limited by the charge to proofs of *intent* toward Wright alone. This position is fully answered by the fact that the difficulty between Houston and DeGraffenried, and the shooting between Houston and Wright resulting in the killing of the former and wounding of the latter, were parts of one entire transaction—were circumstances and *res gestæ* indissolubly linked together, and necessary to elucidate and explain the transaction. Being connected parts of one entire transaction, the evidence was admissible. (Whart. Crim. Evid., 8 ed., sec. 31; *Heath v. Comm.*, 1 Robins's Rep., Va., 735.) All the circumstances of a transaction may be submitted to the jury, provided they afford any fair presumption or inference as to the matter in issue. (1 Starkie on Evid., 39; Roscoe's Evid., pp. 74, *et seq.*; *Keener v. The State*, 18 Ga., 194; *s. c.*, Harrigan & Thompson Cases, Self-defense, 539.)

It is shown by the evidence that Wright, up to the time he was struck with the gun by Houston, was acting the part of a peacemaker, doing all he could to quell the row, and had succeeded in getting DeGraffenried out of the door of the house,

## Syllabus.

when he was struck by Houston with the gun brought by appellant. On the other hand, during "the difficulty" it is proven that defendant cursed and swore at Wright, DeGraffenried and Jackson, and "charged around," and that she said, when she handed the gun to Houston, "I'll be with you," and advanced toward the door and said, "I'll stand by you," and stopped in the door with a pistol in her hand—the one thrown down by Houston—but did not shoot, and did not attempt to do anything with it. But for her acts and conduct in going for and bringing the gun, cursing the parties, giving the gun to Houston, and encouraging him in the prosecution of the difficulty, it is altogether probable that the difficulty would have ended when Wright succeeded in getting DeGraffenried out of the door; that Houston would never have struck or shot Wright with the gun, nor been himself killed by Wright. Judged by her acts and conduct, the *animus* of defendant and her intent to injure appear to have been directed toward all the parties, and to one as much as another.

A very able and ingenious brief has been filed by counsel for appellant in this case. But the premises assumed, in our opinion, are not warranted by the facts, and hence we cannot concur in the conclusions arrived at.

Several points are made with reference to supposed errors in the charge of the court. Understanding the facts as we do, the charge appears to us as an unobjectionable, plain and fair presentation of the law of the case.

We find no error requiring a reversal of the judgment, and it is therefore affirmed.

*Affirmed.*

Opinion delivered May 31, 1884.

[No. 2904.]

## S. W. OGLE v. THE STATE.

1. JURY LAW—NEW TRIAL.—The mere separation of a jury pending verdict is not cause for new trial. In addition to the separation in contravention of law, it must be further made to appear that by reason of such separation probable injustice to the accused has been occasioned. See the opinion *in extenso* for facts of the separation of a jury held not to have

16	361
28	121
16	361
31	154
16	361
37	609
37	610

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Statement of the case.

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prejudiced the rights of the defendant, and therefore insufficient cause for new trial.

- B. PRINCIPALS IN CRIME—MANSLAUGHTER—CHARGE OF THE COURT.—ACCOMPLICE under our Code is the same as an accessory before the fact at common law. As at common law there could be no accessories before the fact to manslaughter, so under our Code there can be no accomplice to manslaughter. But at common law there might be a principal in the second degree to manslaughter, and under our Code the offense of manslaughter admits of principals. Hence the court erred in charging the jury that "the law of principals does not apply to cases of manslaughter," but the error being in favor of the accused, it is not revisable by this court.

APPEAL from the District Court of Falls. Tried below before the Hon. Jo. Abbott.

The indictment in this case was joint against the appellant, Joe Brown and John Kennedy, and charged them with the murder of Allen and William Sams, in Hill County, Texas, on the fourth day of March, 1881. The appellant being alone upon trial was found guilty of murder in the first degree, and his punishment was assessed at confinement in the penitentiary for the term of ninety-nine years.

Mrs. Sams, the mother of Allen and William Sams, testified, for the State, that her two sons left her house in Hill county to go to Waxahachie to sell their cotton and purchase lumber on the Wednesday preceding their death. They were to have been at home on Friday. Their failure to return on Friday night occasioned the witness much uneasiness. On Saturday morning, looking out for them, she saw some objects she could not distinguish near their corn pens. She despatched her little deaf and dumb boy to ascertain what they were. The little boy shortly returned with the information that he had found the dead bodies of his brothers. Witness, her husband and Allen's wife went immediately to the bodies. Allen's wagon stood some yards from the corn pen, the horses unharnessed and tied to the standard, the tongue down. Allen's dead body lay near the hind wheel. He had been shot through the back. There was a scratch on his neck. His tongue was swollen and seemed to have been cut. The clothes were all burned off the body, and the grass had been burned from the ground around him. The grass for twenty feet in the direction of the corn pens was bloody in spots, and the ground showed evidences of a struggle. William's wagon had stopped about seventy-five yards from where

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Statement of the case.

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Allen's body lay. His body was found about half way between his wagon and the corn pen, and his wagon was on the opposite side of the corn pen from Allen's wagon. The traces of but one of his horses was loosed. William had been shot through the breast, his left arm was bruised and his neck broken. Allen and William had commenced to improve the place where the corn pen was—had built the corn pen and put corn in it the previous year. They had some lumber on the ground to improve with, and the lumber they had on their wagons was to be used for the same purpose. Witness's husband had since died.

Ben. Forrest, a freedman; testified, for the State, that he lived about six miles due east from the scene of the killing, and about a half mile from Doctor Schofield's house. About three o'clock on the evening of March 4, 1881, three men, one driving a wagon, and two horseback, driving a drove of about twelve horses, passed the witness's house, going toward the place of the killing. They were then traveling between a walk and a trot. There was a paint horse. The witness also thought that the bunch of animals included three mules. Witness did not know the size of the men. Booker lived about a half a mile from Doctor Schofield, east from the witness's house.

Booker testified, for the State, in almost the same words as did Ben. Forrest. Forrest and Doctor Schofield both lived a short distance east of witness.

Doctor Schofield was the next witness for the State. He testified that he lived on the public road, about six miles north of Hillsboro. Late in the evening of March 4, 1881, he saw one man in a wagon and two horseback, driving a small drove of horses—some six or seven head—pass his house, going in the direction of the place where the killing occurred. They were traveling rapidly. There were a paint, a bay, two or three grays, and, the witness thinks, a dun horse in the bunch. In the direction they were going, to reach the scene of the killing, they would have to pass, in the order named, the houses of Brady, Bains, Stoker, where Hodges lived, and witness's son, where the witness thinks Willis Grigsby lived at the time.

The witness went to the bodies between nine and ten o'clock on Saturday, the morning after the killing. He described the wounds in the bodies, their location, and that of the wagon and condition of the ground, etc., as Mrs. Sams did. He found Mr. and Mrs. Sams and Mrs. Allen Sams on the ground when he got there. Witness and those with him traced some perfectly fresh

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Statement of the case.

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horse tracks and wagon tracks from where they turned off the main road up to the corn pen. The parties who went up to the corn pen came from the southwest, and left going in a north-east direction. The party seen by the witness on the evening before the killing, as stated, were traveling in the direction of this place. Witness saw where horses had been fed around the corn pen on the ground. Small patches of blood were found on the ground, at intervals, for ten or fifteen steps from Allen's body. The grass had been burned off. The corn pen was about a half mile distant from old man Sams's, and was in plain view from every direction.

Cross-examined, the witness stated that the wagon which was traced up to the pen drove off across some plowed ground, and across the road, about two hundred yards from the pen, and struck a hedge about two hundred and fifty yards from the pen. It then turned down the hedge, to an opening through which a road passed, having described a triangle whose base was the hedge. The distance from the hedge to the opening was about two hundred and twenty-five yards. Mrs. Kirkpatrick lived about a mile and a quarter east from the pen.

Willis Grigsby testified that, at the time the Sams boys were killed, he lived on Will Schofield's place, about a half mile from where the killing occurred. Just after supper, between seven and eight o'clock, he heard the report of a gun or pistol in the direction where the killing occurred.

John Brady testified, for the State, that a little before sundown on the evening of March 4, 1881, he saw a man in a wagon and two men on horseback driving a bunch of loose stock, traveling in the direction of the place where the Sams boys were killed. There was a paint horse in the bunch. Witness lived west of Doctor Schofield's house, and between that house and the place of killing.

F. M. Bain, another witness who lived west of Doctor Schofield, testified that three men with a wagon and such a bunch of horses as described by other witnesses passed his house going in the direction of the Sams boys' improvements, about sundown or near night. The witness had since seen one of those men, the one called John Kennedy, in jail and in the court house. He did not know that he could identify either of the other two. Witness noticed Kennedy because of his resemblance to his, witness's, son.

John Chilton, J. M. Hodges and Mr. Rawlan testified that

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Statement of the case.

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they too saw such a party as that described by the previous witnesses pass along the road indicated, on the evening in question. One of those men Hodges afterwards saw under arrest at Brown's ranch, giving the name of John Kennedy. Witness last saw this man on trial for this same offense in this same court house.

William Reavis testified, for the State, that he saw the bodies of the deceased on the ground of the killing. William Sams lay with his hand in his overcoat pocket. He had a pistol with one chamber discharged in his pants pocket. The parties who stopped at the corn pen went off on the road that leads to Dallas and Waxahachie. The route to Brown's ranch followed this road until it passed Edrington's, where it left the road and crossed the prairie. Witness followed the tracks until they passed Edrington's, the point where they should have left the main road to take the shortest route to Brown's ranch. Brown's ranch could be reached the way the track led over a better though somewhat longer route.

White Turner testified, for the State, that he attended a party at Mrs. Kirkpatrick's on the night of the killing. Just before he reached Mrs. Kirkpatrick's house he met three parties—two in a wagon and one driving loose stock—traveling north toward Brown's ranch as rapidly as the wagon and loose stock could travel. The animals in the wagon were going as fast as they could trot and gallop. This was about an hour after dark.

George Kirkpatrick testified, for the State, that he went to Waxahachie with the Sams boys, and returned with them on the evening of March 4, 1881. Allen's wagon was loaded with lumber, and William's with shingles. Allen went on in the direction of his improvements; William stopped at witness's house, got supper and remained about an hour. An hour or more after William left, the witness heard a wagon going past his house very rapidly, the parties with it singing. Very shortly after the wagon passed White Turner arrived at witness's house. The place where the Sams boys were killed was about a mile and a half distant from witness's house.

William Garret testified, for the State, that he lived within a half mile of the place of killing. A short time after dark the witness heard the report of a gun or pistol, fired directly at the place where the bodies were found.

William Berry testified, for the State, that he knew Joe Brown, John Kennedy and Mark Sullivan. (It is shown by other tes-

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Statement of the case.

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timony that Mark Sullivan was the assumed name under which the defendant formerly passed.) These parties lived together at Brown's ranch, two and a half miles from witness's house. In going to Brown's place from Edrington's, one could pass witness's place by going through a pasture. Witness learned of the killing of two men about nine o'clock on the night that the killing occurred, and next morning learned that the men killed were the Sams boys. Joe Brown was witness's brother-in-law. Witness saw the defendant at his, witness's, house a few days after the killing. He came to the house and left it just before day. Joe Brown came to witness's house, horseback, on the night of the killing, and it was while he was there that witness heard of the killing of two men.

W. A. Chapman testified, for the State, that he lived in a mile of and west of Brown's ranch. He spent the evening of the killing with a neighbor. Starting home, between nine and ten o'clock, he heard and saw a wagon driven rapidly into the creek bed. When the wagon mounted the other side, some thirty or forty steps from the witness, he could see that one man was driving a wagon, and another some loose stock of horses and mules. Some of the stock were light colored animals. Witness did not recognize the parties. He had not seen the defendant for a month previous to this. Between that point and the place where the Sams boys were killed several people lived on the road. It was but a short distance to Brown's ranch from the point where the witness saw these parties. Some one in the wagon called out, "Set 'em up," which expression among stock men is equivalent to "drive them up."

Ben Berry testified that he lived at Brown's ranch. He knew Brown and John Kennedy, and he knew the defendant as Sullivan. He had since learned the defendant's name to be Ogle. Witness did not hear of the murder of the Sams boys until a day or two after it occurred. Witness was at Brown's ranch on the night of the killing, together with Mrs. Brown, Willie Smith and Bragg. Brown, Kennedy and the defendant came to the ranch that night, and left together the same night about twelve o'clock. The witness afterward saw Brown at his, witness's, father's house, in the night. He afterward, at his brother's house, saw the defendant. He came there and left there in the night. Brown, Kennedy and the defendant had been gone from the ranch about three weeks when the killing occurred. Defendant and Kennedy came to the ranch that night in a wagon,



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and Brown came on horseback. Witness did not know what, if anything, they brought with them, but next day saw some horses about the place, including a gray and a paint horse. The witness had never before seen the paint horse. Defendant and Kennedy came into the house first that night. They remained about an hour, went out and returned with Brown. It was several days after that that witness first noticed the paint horse.

Cross-examined, the witness said that he did not go out of the house when the parties came. Defendant and Kennedy came first, about an hour before Brown came. Witness went to sleep about twelve o'clock, when Brown, Kennedy and defendant were all present. They were gone when he woke up. It was a week or more before witness again saw Brown. Brown had considerable stock.

Sheriff Cox testified that he used every means in his power to apprehend the defendant after the killing. He went to Brown's ranch and found and arrested Kennedy on the Sunday night after the killing. He went to Fort Worth in response to a telegram and met the sheriff of Ellis county with the defendant and the dead body of Brown.

Squire Vinson testified, for the State, that on the twenty-second day of January, 1881, a complaint was filed in his court charging the defendant with the theft of cattle. The witnesses whose names appeared on the back of the complaint were William Reavis, Allen and William Sams, John Anstead, — Forbes, A. D. Grant and R. O. Kirkpatrick. Defendant could never be found, and was never arrested on said complaint.

The motion for new trial presented the questions discussed in the opinion.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** 1. One of the grounds of defendant's motion for a new trial is that, after his cause had been submitted to the jury, and pending its consideration by the jury, one of the jurors separated from the other members of the body, and remained separate from them about twelve hours. It appears from affidavits filed, and read in opposition to this ground of the motion, that while the jury was deliberating upon the case one of the members thereof became quite sick, and it became

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Opinion of the court.

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necessary to give him attention, and he was separated from the other jurors during the night, but was all the time during such separation in charge of a deputy sheriff, and was not spoken to by any one about the case, nor did he speak to any one about the case, nor was the case spoken about in his hearing during said time. It is shown that such separation could not probably or reasonably have occasioned any injustice to the defendant.

The mere separation of a jury is not cause for a new trial. In addition to the separation in contravention of the law (Code Crim. Proc., Art. 687), it must be further made to appear that by reason of such separation probable injustice to the accused has been occasioned. (Code Crim. Proc., Art. 777; *Davis v. The State*, 3 Texas Ct. App., 91; *Cox v. The State*, 7 Texas Ct. App., 1; *West v. The State*, 7 Texas Ct. App., 150; *Russell v. The State*, 11 Texas Ct. App., 288.) In this case the separation of the jury was not of that character, or accompanied by any of the circumstances which constitute a ground for a new trial.

2. No errors in the charge of the court, or other errors in the proceedings in the case, are complained of by the defendant. We have, however, carefully considered the charge of the court, statement of facts, and all other parts of the record, and we have found no error of which the defendant can be heard to complain. His conviction, as shown by the record, has been obtained upon a fair and impartial trial, conducted in all respects in strict accordance with the forms of law.

3. We find one error in the charge of the court which we think it advisable to call attention to. The learned judge states in his charge that "the law of principals does not apply to cases of manslaughter." This was doubtless a mere clerical mistake in the charge. There is no such exception made in the provisions of our Code. (Penal Code, Arts. 74 to 78.) There can be no *accomplice* to manslaughter, and it was this rule of the law, perhaps, that the learned judge had in his mind when he penned the instruction quoted. (Penal Code, Art. 85.) An accomplice under our Code is the same as an accessory before the fact at common law. (Penal Code, Art. 79; 3 Greenl. Ev., sec. 42; 1 Bish. Cr. Law, sec. 673.) And at common law there could be no accessory before the fact to manslaughter, because manslaughter is an offense which is considered in law sudden and unpremeditated. (1 Hale P. C., 613-615; 4 Black. Com., 35; 1 Bish. Cr. Law, sec. 678.) But at common law there might be a principal in the second degree to manslaughter, such principal being one

## Statement of the case.

who did not with his own hand commit the act, but was present aiding and abetting it (3 Greenl. Ev., sec. 40; 1 Bish. Cr. Law, sec. 678), and in our opinion such is the law under our Code. (*McMahon v. The State*, ante 357.)

But this error in the charge is immaterial in this case, because it was favorable to the defendant, and he could not be heard to complain of it, nor, in fact, has he complained of it. We have noticed this portion of the charge for the sole purpose of calling attention to what we believe to be the law upon a question which has not before been decided by this court.

Finding no error in the record of which the defendant can complain, the judgment is affirmed.

*Affirmed.*

Opinion delivered May 31, 1884.

[No. 3144.]

## EX PARTE JOSEPH W. BARBER.

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35 360

1. **HABEAS CORPUS.**—STATEMENTS OF FACTS, in habeas corpus cases, must be made up and certified by the trial judge in the same manner as in other criminal cases. Not even in *habeas corpus* cases can a statement of facts approved after the expiration of ten days allowed by the order of court be considered for any purpose.
2. **EVIDENCE—DYING DECLARATIONS—CASE STATED.**—It was objected to the dying declarations as evidence (reduced to writing) that the statement contained both competent and incompetent evidence. The objection being well taken, the rule applicable is as follows: "When a written instrument contains both legal and illegal evidence, the court cannot be required to expunge that which is illegal. If the court points out to the jury the illegal testimony, and designates it so that the jury can identify it, it is all that can be required."
3. **SAME.**—A correct rule of evidence is thus stated: "A statement by the deceased of a distinct fact, not connected with the circumstances of the death or the immediate cause of it, is not admissible as a dying declaration, though competent and legal evidence if established by any other competent witness." See the opinion *in extenso* for evidence to which this rule is held applicable.

APPEAL from the District Court of Limestone. Tried below before the Hon. L. D. Bradley.

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Opinion of the court.

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The appellant in this case was refused bail and remanded to custody under an indictment charging him with the murder of Joe Lee Wood, in Limestone county, on the eighteenth day of September, 1883. The statement of facts brought up with the record is rejected because approved by the trial judge after his authority over the same had terminated.

*M. D. Herring* and *C. B. Pearre*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

HURT, JUDGE. The appellant is charged by indictment with the murder of Joe Lee Wood. Wood was shot on the eighteenth day of September, 1883. On this day appellant surrendered himself and gave bail in the sum of twenty-five hundred dollars. Wood died on the thirteenth day of October, 1883, and as soon as his death was made known to appellant he again surrendered himself and has been in jail since. On the fifteenth day of October he applied and obtained the writ of *habeas corpus*, but before the trial the indictment was presented. The writ was heard on the twenty-seventh day of October, 1883, and bail was refused. A second application was presented to the Hon. L. D. Bradley on the seventeenth of December, 1883, and was heard on the thirteenth of January, and bail was again refused. A third application was made and bail again refused, and this appeal taken.

This cause was heard at the regular term of the district court of Limestone county. Court adjourned on the tenth day of April, 1884. An order was made allowing ten days after the adjournment of the court to prepare and file a statement of the facts. The statement of facts was not filed until the twenty-third day of April, 1884. The cause being tried in term time, and the statement of facts not being filed within ten days after adjournment of the court, can this court consider the facts? This precise question arose in *Ex parte Cole*, 14 Texas Court of Appeals, 579, and in that case it is held that "the statement of facts should be made up and certified or approved by the judge as in other criminal cases." There being no statement of facts which this court can consider, and the appellant being charged by indictment with murder, the judgment must be affirmed.

Notwithstanding we cannot consider the statement of facts on this appeal, nevertheless, assuming it to be correct, two ques-

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Opinion of the court.

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tions are presented which we deem of the greatest importance, in view of the fact of another trial.

First, the deceased's dying declarations were reduced to writing, and upon the trial these statements were introduced in evidence over the objections of appellant. We will notice but two of the objections urged by appellant to their admissibility:

1. That these written statements contained incompetent as well as competent evidence. We find this objection to be true; but must these statements be rejected in toto because of this? What is the rule under this state of case? It will be found clearly stated in *Johnson v. The State*, 17 Alabama, 618, and is as follows: "When a written instrument contains both legal and illegal evidence, the court cannot be required to expunge that which is illegal. If the court points out to the jury the illegal testimony, and designates it in such a manner that the jury can identify it, it is all that can be required." The illegal evidence contained in these written statements is especially pointed out in the next objection.

2. "Because said statements include matters other than the circumstances of the shooting of deceased." It appears from the record that appellant and deceased had, not long before the homicide, a difficulty about some pigs, and that on Sunday evening before the shooting, which occurred on Tuesday, a note was found at appellant's door. This note reads thus: "Mr. Joe Barber, you have got till Monday nite to leave in, or you will have to go where the buzzards won't get you." At the bottom of this note was drawn a coffin.

In the second statement of deceased we find this matter in relation to the note: "I never left a note at Joe Barber's house ordering or advising him to leave, and never knew of any such note being left, or any intention or purpose to leave such a note, or any note whatever, by any other persons. Nor did I at any time or in any way threaten his life, nor had I at any time whatever any intention of taking his life in any way." All of this matter was very clearly illegal testimony.

We, however, are not to be understood as intimating that the learned judge who tried this case held it competent. These written statements of deceased, so far as these two objections are concerned, were admissible, and as there was no jury the judge could not be expected to publicly announce his opinions upon what was and was not legal and illegal matter contained in these statements.

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Statement of the case.

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But we have said that this matter was clearly illegal. Now, we are not to be understood that under the facts of this case such matter or evidence could not be adduced by the State; for it is not obnoxious to the objection of irrelevancy. The objection to it is that such matter cannot be established by dying declarations; the rule being that the statement by the deceased of a distinct fact not connected with the circumstances of the death, or the immediate cause of it, is not admissible as a dying declaration, though competent and legal evidence if established by any other competent witness. (*Johnson v The State*, 17 Ala., 618; *West v. The State*, 7 Texas Ct. App., 150.)

There being no such statement of facts as can be considered by the court, the judgment is affirmed.

*Affirmed.*

Opinion delivered May 31, 1884.

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16	372
29	248

[No. 3109.]

J. C. JOHNSON v. THE STATE.

**PRACTICE—STATEMENT OF FACTS.**—In this case the trial court of its own motion entered up an order granting ten days after adjournment for the preparation of a statement of facts. Such statement of facts was prepared within the ten days and presented to the judge for his approval. It was, however, disapproved by him, and he prepared no statement himself in lieu thereof. This action of the court is alone relied upon for reversal. *Held*, that, as the appellant was not in default, the error necessitates the reversal of the judgment.

**APPEAL** from the District Court of Hopkins. Tried below before the Hon. G. J. Clark.

The indictment against the appellant was for arson, and charged him with the burning of J. A. Weaver's gin house, in Hopkins county, Texas, on the twenty-fourth day of December, 1883. Trial resulted in conviction, and the punishment was affixed at a term of five years in the penitentiary.

*W. P. Leach*, for the appellant.

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Syllabus.

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*J. H. Burts*, Assistant Attorney General, for the State.

HURT, JUDGE. The appellant was convicted of arson. An order that the statement of facts be filed in ten days after adjournment was made by the court upon its own motion. Court adjourned on March 29, 1884. A statement of the facts was prepared and presented to the judge for his approval within the ten days, but was disapproved by the judge, and no statement was prepared and approved by him. This is the only ground relied upon for a reversal of the judgment.

There being no fault on the part of the appellant in regard to this matter, the judgment must be reversed. (See this subject discussed in the cases of *Ruston v. The State*, 15 Texas Ct. App., 324; and *Ruston v. The State*, Id., 336.)

Assuming that which purports to be a statement of facts to be correct, we believe it to be our duty to make these observations:

1. Giving to the evidence of the State full credence, and viewing it in the most favorable light to the prosecution, still we do not think it sufficient to sustain the conviction.

2. Every fact of the slightest materiality criminating the defendant was, we think, satisfactorily explained by his witnesses, and made to harmonize with his innocence.

For the error above indicated, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered May 31, 1884.

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[No. 2991.]

JAMES JACKSON v. THE STATE.

1. PRACTICE—PLEA.—Unless the transcript on appeal discloses that a plea by or for the accused was entered, a conviction cannot stand.
2. SAME—PLAYING CARDS IN A PUBLIC PLACE.—INDICTMENT for playing cards in a public place must allege the facts constituting the place a public place, unless the place alleged be one of those enumerated in the Penal Code. Allegation that the game was played "in a public place, to-wit, in the room back of the Gilt Edge saloon," is not sufficient.

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Opinion of the court.

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APPEAL from the County Court of Coleman. Tried below before the Hon. W. O. Read, County Judge.

The opinion discloses the nature of the case. The penalty imposed by the verdict was a fine of ten dollars.

*Coleman & Randolph*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

HURT, JUDGE. This is a conviction for playing cards. 'In the record we find two errors fatal to the judgment. 1. There is no plea by defendant. 2. The indictment alleges that defendant did unlawfully play at a game of cards "in a public place, to-wit, in the room back of the Gilt Edge saloon."

The rule upon this subject is that if the indictment alleges that the playing took place in or at a house or place mentioned in the Code, this will suffice; but if the playing occurred in or at any other public house or place, not mentioned in the Code, the facts constituting it a public house or place must be alleged.

It is charged in the indictment that the playing occurred in a room back of the Gilt Edge saloon, and that this room was a public place. How far from the saloon was this room "back of the saloon" situated? What connection was there between the saloon and this "room back of the saloon?" If this room had been attached to a public house, and was commonly used for gaming, an indictment charging a house named in the Code or setting forth the facts constituting the house a public house, and alleging that the room in which the game was played was attached to such house, would be good. But if the room, house or place is not mentioned in the Code, but is nevertheless public, the facts making it public must be stated in the indictment.

Because there is no plea by defendant, and because the indictment is defective in substance, the judgment is reversed, and because of an insufficient indictment, the prosecution is dismissed.

*Reversed and dismissed.*

Opinion delivered May 31, 1884.



## Opinion of the court.

[No. 3188.]

16	375
31	12
16	375
35	463

## ROBERT FOSSETT v. THE STATE.

**PLAYING CARDS IN A PUBLIC PLACE.**—INDICTMENT, to charge the offense of playing cards in a public place, must allege the facts which constitute the place of playing a public place, unless the place be one specifically enumerated in the Penal Code. Livery stables are not so enumerated, and it does not suffice to aver that the livery stable was a public place, without alleging facts which constitute it such a place.

**APPEAL** from the County Court of Bosque. Tried below before the Hon. R. G. Childress, County Judge.

The conviction was for playing cards in a public place. A fine of ten dollars was the punishment imposed.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** The indictment upon which this conviction was had charges that the defendant played cards "in a certain livery stable, in the loft of said livery stable, then and there being a part of said livery stable, overhead and above the stalls of said stable, to-wit, in the town of Meridian, and commonly known as Whitworth stable, or red stable, the said livery stable, and the said loft thereof, then and there being a public place."

In *Jackson v. The State*, decided by us at the present term, we held a similar indictment insufficient because it failed to allege the facts which constituted the place of the playing a *public place*; the said place not being one of those specifically named in the statute. (Penal Code, Art. 409.) A "livery stable," nor the loft thereof, not being named in the statute, it was essential that the indictment should have alleged the facts which constituted the same a public place. (*State v. Fuller*, 31 Texas, 559; *Elsberry v. The State*, 41 Texas, 158; *Jackson v. The State*, ante, p. 373.)

Defendant's motion in arrest of judgment, because of the

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Opinion of the court.

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above stated defect in the indictment, should have been sustained.

Because the indictment is substantially defective, the judgment is reversed and the prosecution is dismissed.

*Reversed and dismissed.*

Opinion delivered June 4, 1884.

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No. 8128.

HENRY WASHINGTON v. THE STATE.

1. EVIDENCE—To warrant the conviction of two or more persons as principals in the same offense, the evidence must show such co operation or complicity between them as constituted them principals.
2. SAME—CASE STATED.—Appellant and one R. were separately indicted and tried as principals in the murder of the former's wife. At neither trial was there any evidence tending to show co-operation or complicity between them in the commission of the nomicide, and yet, upon the same state of proof, each of them was convicted as a principal in the murder. *Held*, that in this condition of affairs the two convictions are irreconcilably repugnant to each other, and in the present case the court below erred in refusing a new trial.

APPEAL from the District Court of Falls. Tried below before the Hon. B. W. Rimes.

The case will found clearly stated in the opinion of the court. In the report of the case of *Robinson v. The State*, ante, page 347, will be found the evidence upon which the convictions were had in the court below in both cases. A life term in the penitentiary was the punishment awarded against the appellant, being the same penalty as that assessed against Robinson.

*Martin & Dickinson*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WILLSON, JUDGE. This is a companion case to that of *Pleasant Robinson v. The State*, the judgment in which was reversed at a former day of the present term. The evidence in the two cases is substantially the same. This defendant and Pleasant

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Opinion of the court.

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Robinson were indicted separately for the murder of Jane Washington, the wife of this defendant, and were separately tried and convicted, as principals, of murder in the first degree, the penalty assessed against each being confinement for life in the penitentiary.

We held in Pleasant Robinson's case that the evidence was insufficient to support the verdict of the jury; that it did not establish, with that degree of certainty demanded by the law, the alleged fact that the death of deceased had been produced by the criminal act or agency of another person; that it did not exclude the reasonable hypothesis that deceased may have come to her death by disease or accident. In this case we have again carefully reviewed and considered the evidence, and we are strengthened in our previous conclusion, that the State has failed to establish the *corpus delicti*.

An illustration of the uncertainty of the evidence as to who murdered Jane Washington, if she was murdered, is afforded by the separate convictions of Pleasant Robinson and this defendant of the supposed crime. There is not a word in the testimony of the two cases which proves that they acted together in the commission of the crime, or had agreed and conspired together to commit it; and yet they are each convicted as principals in the act. In order to justify the conviction of both, as principals, the evidence must have shown such a complicity with each other in the crime as under the law would constitute them principals; and such facts are not shown in either of the cases. Hence, we have two convictions, of different parties, for the same murder, without any evidence connecting them in the act, and without evidence establishing which one of the accused parties in fact perpetrated the homicide.

Can a conviction of either be sustained under such circumstances? There is as much reason to suppose that one of the convicted parties committed the murder as that the other committed it. One jury have said by their verdict that Henry Washington did it. Another jury have said by their verdict that Pleasant Robinson did it. Which verdict is correct? Both verdicts might be correct if the evidence had shown that they acted together in the commission of the deed in such manner as to make them principals with each other; but, as before said, there is no such evidence in either of the cases.

While we always regret the necessity of having to disagree with a jury upon the facts of a case, still, in the discharge of

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Syllabus.

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our duty, we must set aside a verdict when in our opinion it is not supported by the evidence. Because the evidence in this case is insufficient to support the verdict, and because the trial court, for that reason, erred in refusing defendant a new trial, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered June 4, 1884.

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[No. 3146.]

JOHN TURNER v. THE STATE.

1. **MURDER—RIGHT OF DECEASED TO REPEL INVASION OF HIS HOUSE—CHARGE OF THE COURT.**—In a murder trial, the court, upon request of the State, charged the jury as follows: "Every man has a right to protect his house from invasion and his family from insult, and, in so protecting them, he has a right to use such force as may be necessary to accomplish his end, after verbal remonstrance has failed; and in the use of such force he will not be considered an aggressor or violator of the law." *Held*, that, while correct in the abstract, this charge was error, in view of the evidence on the question; first, because the evidence shows that there was no invasion of the deceased's premises by the defendant and his associates, but that, on the contrary, they entered upon the premises by invitation of the deceased; and, second, because, having so instructed the jury, the court should have further instructed them that if deceased used greater force or more dangerous means than were necessary to effect the expulsion of the parties, he thereby became himself an aggressor, and was no longer entitled to the immunity which the law, up to that time, afforded him in the protection of his castle. See the opinion *in extenso* on the question.
2. **SAME—SELF-DEFENSE.**—At the instance of the State, the court further instructed the jury as follows: "If you believe from the evidence that defendant and Britton Turner and Tom Stanley went to the house of deceased and cursed and swore and raised a disturbance in the yard of deceased, and were bid by deceased to leave, and refused to do so, then deceased had a right to use all necessary force to put them out of the yard, and if they resisted such force, they cannot justify such resistance on the grounds of self-defense." *Held*, correct in principle, but, in view of the evidence, insufficient in that it did not further charge, in substance, that if the deceased used more force than was necessary to expel the parties, and thereby became himself the aggressor, the law accorded to Stanley the right of defense to the extent of protecting himself against

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Statement of the case.

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the excessive force used. Note the circumstances of this case, wherein it is *held* that if S., the party who inflicted the fatal blow, acted in self-defense, and was justifiable, the defendant would also be guiltless of the homicide.

3. SAME — PRACTICE — CASE STATED.—The charges recited were special charges given at the instance of the State, but were not excepted to by the defendant on the trial, nor did he ask additional instructions. They were, however, complained of by him in his motion for new trial. This motion also complained of the failure of the court to charge all the law of the case. *Held*, that the special charges, given in such manner, separate and distinct from the main charge and from each other, and without being accompanied by a further explanation of the law of the case, were calculated to mislead the jury, and materially to prejudice the rights of the defendant.
4. SAME—CHARGE OF THE COURT—IMPLIED MALICE.—Where the fact of unlawful killing is established, and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse or justify the act, then the law implies malice, and the offense is murder in the second degree. See the opinion for a charge upon the subject *held* inconsistent with the rule announced, insofar as in explaining implied malice it omits the qualification that where a homicide is committed under "mitigating circumstances" malice is not implied, although the homicide may be neither excusable nor justifiable. Note the suggestion of this court on the subject.

APPEAL from the District Court of Houston. Tried below before the Hon. J. R. Kennard.

The indictment in this case charged the appellant with the murder of G. W. Montzingo, in Houston county, Texas, on the twenty-seventh day of October, 1883, by stabbing him with a knife. He was convicted of murder in the second degree, and his punishment was assessed at a term of fifteen years in the penitentiary.

Fletcher Thomas, the first witness introduced for the State, testified that he lived on Nevill's prairie, in Houston county, Texas. He knew the defendant, and knew the deceased, G. W. Montzingo, at the time of his death. The witness saw the defendant in the town of Lovelady, in Houston county, on the evening before the killing. At the same time, and in the same town, he saw Tom Stanley and the deceased together. He remembered no other persons he saw at the time. He heard the defendant tell the deceased to take an ax handle and wear Tom Stanley out with it. Something was said about a saddle, which the witness did not understand.

Bob Stevens was the next witness put on the stand by the

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State. He testified that, in the latter part of October, 1883, when the deceased was killed, he, witness, lived in Walker county near the line, and near Nevill's prairie. His house was situated on the road between the houses of the defendant and the deceased, some three or four hundred yards distant from the former, and about three hundred and fifty yards distant from the latter. On the evening of the killing, which occurred in Houston county, late in October, 1883, the witness was in a ditch near the road and heard the defendant say: "Let's go down to the old son of a b—h's house and see him." The witness saw no one at this time, but distinctly heard this remark made by the defendant. Witness did not see the defendant, or Stanley or Britton, before the killing. After the killing, the defendant came to the witness's house and told him that he wanted him to go down to Whit's house; that Tom Stanley had cut Montzingo, he expected fatally. The defendant said at that time that a difficulty had occurred. He had a gun with him. The witness went at once to Montzingo's house, and found him lying on the gallery. His wife and children were in the house. Doctor Glover arrived at the house of the deceased soon after the witness did. The witness saw no blood at the house of the deceased except on the gate post on the outside of the paling, and in the walk leading from the gate to the house. The witness did not think that the feeling between the deceased and the defendant was good at the time of the homicide. A few days before the killing the defendant said that the deceased owed him a small sum and would not pay it, and it was from this the witness inferred that the feeling between the defendant and deceased was not good. The defendant lived with his father, some seven or eight hundred yards distant from the deceased's.

Referring to the remark the witness overheard the defendant make just before the homicide, the witness said he was in a ditch at the time watering his oxen. At the house of the deceased, the witness asked Mrs. Montzingo for deceased's gun. She looked for it but could not find it, and it was supposed that the gun had been taken off. Buck Shaw was there, but said nothing about the gun, nor where it was, before he went off. He came back after dark and said that he knew where the gun was; that it was out against the fence, where it was found. It had been previously looked for at that place. From the gate to the gallery the distance is about seven or eight steps. When the defendant came to the witness's house and asked him to go

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and attend to Montzingo, he said: "We got into a difficulty, and Stanley cut Montzingo three times." Tom Stanley, the defendant and Buck Shaw came by the witness's house, Buck Shaw walking. Henry Montzingo and Britton Turner both told witness that the latter went after the doctor for the deceased. The witness did not know where the deceased lived during the year 1882, but had hear him say that he lived at the place of Turner's father. No lawyers that the witness knew were present at the inquest over Montzingo's body. After the witness heard the defendant say "let's go to the son of a b--h's house," he went to the well to get a bucket of water, and while there heard loud talking at Montzingo's house. Tom Stanley and Buck Shaw came to witness's house just after witness got back with the water.

Doctor Glover testified, for the State, that he was called in to see the deceased in October, 1883, and found him suffering from two wounds. One wound was in the back just under the shoulder blade, and it looked like it had been inflicted with a knife or ax. It was three and a half or four inches long. The second wound was in the breast and was one inch and a half long, cutting the heart. Either of these wounds would have proved fatal. The deceased was dead when the witness reached him. A man cut in the region of the heart would bleed profusely. Witness saw no blood outside the gate. Mr. Stevens and the family of the deceased were at the house of the deceased when the witness arrived. Mrs. Montzingo, the wife of the deceased, was cut upon the arm and was otherwise bruised. The witness saw an ax lying on the ground, one or two feet inside the gate. The wound under the shoulder blade had the appearance of having been inflicted with an ax.

The deceased went to the town of Lovelady with the witness, about twelve o'clock on the day that he was killed, and returned with McManners. Witness saw the defendant, Britton Turner and Tom Stanley in the town of Lovelady on that day. Witness saw Britton Turner after the killing. Britton called him to go and see deceased. The deceased was a man of feeble health, and would not have weighed above one hundred and thirty or one hundred and thirty-five pounds at the time of his death. The defendant, Britton Turner and Tom Stanley are all able bodied, stout men. The witness thought good feeling existed between the parties. Messrs. Wills, Worthington and Hooper assisted the witness in hunting for blood about the premises, but

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none was found outside the gate. Witness saw blood on the ax and on the handle of the ax, as it lay in the yard. Witness went to Lovelady after the officers. Mr. Moore made the arrest of the defendant, Britton Turner and Tom Stanley. They were arrested at Mr. Turner's old place, where Mr. Williamson lives. The wound under the shoulder blade could have been made with an extraordinary knife.

The witness testified that he had been practicing medicine for twenty-eight years. He was not, however, a regular graduate, and had no diploma, but was recognized and consulted by his medical brethren as a physician. He felt much interest in the present case, and was one of the private prosecutors. He assisted in forming the jury, and aided in raising money to employ special counsel for the prosecution. He was impelled to do this by the poverty of deceased, and the further fact that the deceased, when killed, was his tenant. If the heart of a man be pierced by a knife, blood will instantly follow the withdrawal of the instrument. Montzingo's shirt was so torn as to leave nothing to obstruct the flow of blood.

Mrs. Montzingo was the next witness for the State. She testified that she was the widow of the deceased. Some time in the month of October, 1883, about sundown, the defendant, with Britton Turner and Tom Stanley, rode up to the house of the deceased and hailed the deceased at the gate. The parties named then got down from their horses and came into the yard. The defendant walked up to the step on the gallery, put his hand on deceased's shoulder, and said: "Mr. Montzingo, I understand that you have been cursing and abusing my father." Deceased denied that he had ever done so. At this point Britton Turner threw his hat on the gallery, and said that he could whip any man who talked about his father. Witness ordered the party out of the yard, because, as she told them, they had come to create a difficulty. Witness repeated the order three different times. They did not go. The deceased ordered them to leave the yard, and upon their failure to leave, the deceased caught up an ax handle and struck Tom Stanley. Thereupon the defendant, Britton Turner and Stanley backed toward the gate, facing the deceased. The deceased struck Stanley a second blow with the ax handle, while they were about half way between the gallery and the gate. The three parties then gathered around the deceased and killed him. The deceased did not strike Stanley on the head, but on the shoulder. Britton Turner



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went to the wood pile and stooped as though picking up something. After the difficulty the witness saw an ax lying in the yard, stained with blood from one end to the other. Witness left this ax at the wood pile, about ten feet outside the gate, that evening. Stanley cut the witness with a knife, and some one of the party, witness did not know who, struck her with an ax handle. The witness had two children. The difficulty, which terminated in this homicide, occurred in the yard of the deceased.

The defendant, Britton Turner and Stanley left immediately after the difficulty, and the deceased died within five minutes. Witness did not see any one strike the deceased with the ax, but just after the difficulty she saw the ax lying, bloody, across the gate opening inside the yard. She did not see the ax used during the difficulty. She did not hear the defendant tell Stanley that they intended to have no difficulty at the house. She saw Buck Shaw on the place before the conclusion of the difficulty. He was there on horseback. After the cutting the witness's step-son, Henry Montzingo, went into the house and got the gun, which the defendant took from him, and carried off. The gun was next found in the corner of the fence. The deceased stripped off his coat before he caught up the ax handle and struck Stanley. The witness testified before the jury of inquest, but did not state on that investigation that the deceased struck Stanley three times with the ax handle. She did not state on her examination that the deceased backed the party to the gate before the cutting. They never reached the gate before the cutting. She did not state at the inquest that the several parties were at and just in the gate when the deceased ran up to Stanley. Witness did not see who of the parties stabbed the deceased, but saw Stanley have a pocket knife in his hand after the cutting. The witness saw no other weapons of any kind during the fight.

Britton Turner came to the deceased's house on the morning of the homicide, and asked if deceased was going to town; saying that, if so, they would go together. Witness knew of no previous difficulty of any kind between the deceased and any of the parties, and had no idea what the occasion of this difficulty was. Blood was scattered all about the place on the inside, but witness saw none outside the yard. There was blood on the gate post, and there was blood on the persons of the witness and her children. Witness's step-son, Henry, and Britton Turner went

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after Doctor Glover, who arrived within a few minutes after the cutting. The deceased's shirt was torn almost entirely off of him during the fight. Witness saw the whole of the difficulty. She was present and testified at the inquest, but at the time was laboring under great mental excitement.

Henry Montzingo, the son of the deceased, and step-son of the last witness, was next introduced by the State. He testified that he saw all of the difficulty in which his father lost his life. The three parties charged with this homicide rode up to deceased's gate, hailed the deceased and got down from their horses. Deceased invited them in. They came in, and the defendant walked up to the steps, put his hand on the deceased's shoulder, and accused him of cursing and abusing old man Turner. Deceased denied having done so. The defendant then called on Stanley to prove that deceased had cursed and abused old man Turner, the defendant's father. Mrs. Montzingo at this point ordered the party to leave the place, but they would not go. The deceased then ordered them to leave, and they again refused. Deceased then caught up an ax handle, pulled off his coat and struck Stanley a blow on the head. The party then backed towards the gate. The deceased pursued and struck Stanley a second blow, and struck at him a third time, which last blow was warded off Stanley by the defendant. Stanley then ran up to the deceased and made a motion at him as though cutting him. At this time the party was about two feet inside of the gate. After cutting the deceased Stanley ran off towards the prairie on foot, his horse having broke loose. Witness did not know where the defendant went to. The witness saw no ax used during the difficulty, but he saw an ax on the ground after the difficulty. There was some blood on the blade, and some few drops on the handle. When the deceased cried out that he was cut, the witness ran into the house, got a gun and returned. The defendant took the gun away from the witness, but made no effort to use it. Witness saw considerable blood in the yard, but none on the outside. Several persons examined the premises for blood.

The witness heard no loud or angry words used during the fight except those used at the time that the defendant caught the deceased's shoulder when he first stepped up to the gallery. Stanley was standing out in the yard between the gallery and the gate, when called upon by the defendant to verify the charge against the deceased of having cursed old man Turner. All

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three of the parties backed when the deceased struck Stanley with the ax handle. Stanley ran into the deceased when the latter struck at him the third time. Witness did not see the defendant make any effort to hurt the deceased. The ax handle used by the deceased was a new one. It was lying on the gallery, and when the deceased went to pick it up the defendant, who was then standing on one of the steps, backed off. Deceased said to Stanley: "You are the man who told the lie; get out," and struck him. Stanley was not quite to the gate when the deceased struck at him the third time. Witness at no time during the fight heard defendant say to Stanley: "Cut him" or "kill him." Britton Turner went for the doctor, and arrived at the doctor's house before the witness did. Witness's mother (step-mother) was cut on the arm by some one, the witness did not know who. The witness saw an ax lying in the walk between the gate and the gallery, after the fight, but did not know how it came to be bloody. A man, if cut outside the gate, in going to the point where the deceased fell, would have had to pass over the ax if it lay in the yard where the witness saw it. Witness saw blood on the left gate post, as one goes into the yard, but saw no blood outside the yard. When the party first came to the house Britton Turner said, throwing his hat down on the gallery, that he could whip any man who abused his father. The witness heard no one of the parties say that they had not come for a difficulty. At this point the State closed.

Buck Shaw was the first witness introduced by the defense. He testified that he was in no way related to any of the parties to this difficulty. He was present at the time of the difficulty, and saw the whole of it. As the witness rode up to the house of the deceased he heard a conversation between the defendant and Mrs. Montzingo. The deceased said that he had not cursed and abused old man Turner. The defendant and Britton Turner then remarked that they had nothing against the deceased, and the defendant further said to the deceased that he did not care how much deceased cursed him, but that he could not abuse his father. The deceased then picked up an ax handle, and pointing it at Stanley, said: "There is the G—d d—d son of a b—h who told the lie." Deceased then ordered the party to "get out." They all walked out of the yard at the same time. Deceased then started out of the yard after them, and defendant caught him to keep him from going out of the yard. The deceased then struck Stanley twice with the ax handle, and struck at him the

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third time, when Stanley ran off. Deceased ran after Stanley, and Stanley turned and cut him. Deceased did not even touch Stanley in the yard, and no one was hurt in any manner until the parties got entirely out of the yard. Witness sat on his horse within ten feet of the fight, and saw it all. After the deceased was wounded he went back into the yard and sat down on the door steps. Stanley was a smaller man than the deceased. When the deceased said that he was cut, he also said to the defendant: "John, Stanley has killed me." Henry, the deceased's son, then ran into the house and got his father's gun, which the defendant took away from him, asking him what he wanted with it. Henry replied that he got the gun for the purpose of shooting Stanley.

The witness remained at the house of the deceased but a few minutes after the difficulty, but was back there next day, and saw blood on the gate post, and also on the beam of a plow that stood outside the gate. The witness had known both the defendant and the deceased for several years, and had always known them to be friendly to each other. The witness saw nothing of a bloody ax about the deceased's premises. The witness was arrested for complicity in this homicide. The deceased never forbade the witness visiting a young lady—a sister-in-law of this defendant—at his, deceased's, house. The witness had stated that the Turner girls were crying when he, witness, was at their house, and that they asked him to go to Montzingo's and stop the difficulty. Witness was at that time visiting a sister of the defendant. An unfortunate circumstance has happened to one of Mr. Turner's daughters since the death of Montzingo. The witness heard Britton Turner tell Stanley, at the house of deceased, that if he, Stanley, took the d—d lie, that he, Britton, would whip him, Stanley. Witness saw Stanley with a knife before any blow was struck, and saw him strike deceased three or four times. Witness was not at or about the house of the deceased that night, looking after the gun. Witness and the parties charged with this offense did not meet Bob Stevens that evening. Stevens was at home. The defendant had no gun when he and defendant went to Stevens's house. Mrs. Montzingo was in the yard when the deceased caught up the ax handle. The grand jury found no indictment against the witness for complicity in this killing.

George W. Rowan was the next witness for the defense. He testified that he was in no way related to any of the parties to

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this prosecution. He had known them all, defendant and deceased, for about three years. The witness saw the defendant and the deceased in the town of Lovelady on the day of the killing. He went home with the defendant, a short time before sundown. Stanley, who had been to town, came to Mr. Turner's a short time afterward. Stanley was living with the Turners at that time. Britton Turner, defendant and Stanley, after a time, went off in the direction of the deceased's house. They said nothing about where they were going. Witness was at the house of the deceased the next morning. He saw blood on the gate post, on the palings to the left of the post, on the beam of a plow that stood about five feet from the gate, and on some chips that lay about five feet in front of the gate. The chips had been somewhat stirred up. He saw an ax to the right of the gate, at the wood pile. The handle was somewhat bloody, but the witness saw no blood on the ax. The defendant and the deceased always appeared friendly. Witness had seen the deceased and all the parties charged with the murder together, and had never known or heard of hard feelings existing between them. He had never heard of any threats uttered against the deceased. Witness was a single man. Neither Buck nor James Shaw were married men.

Witness stayed at Mr. Turner's house all night the night of the killing. Witness did not know the location of the place called the "old Turner place." Witness went to the house of Mr. Clark, Mr. Turner's son-in-law, to tell Mr. Turner about the occurrence, remained about one hour, and returned to Mr. Turner's that night and remained all night. He went to Mr. Clark's to see Mr. Turner at the suggestion of James Shaw. The blood on the pickets (palings) spoken of by witness extended over three pickets to the left of the gate post, going into the yard.

J. B. Jones was the next witness for the defense. He testified that he was at the house of the deceased on the next day after the killing, about eight or ten o'clock. He saw blood on the pickets outside of the fence, on the gate post, on some chips four or five feet from the gate, and on the beam of a plow. He saw no blood on the axe. The gate was standing open when the witness got to the house. There was a great deal of blood about the gate. It was on the left of the gate, and on the pickets to the left of the gate, as one would go into the yard. The blood on the chips was in drops.

James Shaw testified, for the defense, that he had known the

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defendant for ten years, and, at the time of his death, had known the deceased about six years. He was at the house of the deceased on the morning after the killing, and saw blood on the palings and chips, the fence post and a plow beam outside the yard. The witness was with the parties on the day that the killing occurred, but was not present when it did occur. He had never heard any of the parties, deceased or defendants, say anything ill of each other. The father of the defendant was at the house of his daughter, Mrs. Clark, when the killing occurred. Witness and Buck Shaw were brothers. No particular person told Buck Shaw to go to deceased's house on the night of the killing. He was advised to go, as the boys might flog the deceased. Witness was arrested as a party to this homicide, but was released on the day of his arrest.

The defense then introduced the written testimony of Mrs. Montzingo, taken before the jury of inquest, and read from it as follows: "Mr. Montzingo took off his coat, took up an ax handle. As they all backed in line to the gate, Mr. Montzingo struck Tom Stanley. Then Mr. Montzingo struck at Stanley three or four times. When Stanley ran up to Mr. Montzingo, we were just in the gate."

The motion for new trial raised the questions discussed in the opinion, and denounced the verdict as against both the law and the evidence.

*Cooper & Cooper*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** In October, 1883, G. W. Montzingo was killed at his home, in Houston county. He was stabbed to death with a knife by one Thomas Stanley. The killing occurred near sundown of the day. Montzingo, Stanley, defendant, and Britton Turner had met together on that day in Lovelady, a town about four miles distant from Montzingo's home. While in Lovelady, and also while returning home from there in the evening, Montzingo and Stanley had some angry words with each other about a saddle. The evidence shows no bad feeling between Montzingo and the Turners, but, on the contrary, shows that they were friendly with each other. The Turners and Stanley resided but a short distance, not exceeding half a mile, from Montzingo's. The Turners reached home on that evening be-

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fore Stanley did, and when Stanley came he told them, it seems, that Montzingo had been cursing their father. Learning this, John Turner, the defendant, was heard to remark that they would go and see Montzingo about it, at the same time using an abusive epithet toward Montzingo. Defendant, Britton Turner and Stanley then went together to Montzingo's, and upon arriving at the gate were invited by Montzingo, who was in the gallery of his house, to come into the house. They went up to the gallery of the house, which was about fifteen feet from the gate, and defendant stepped upon the gallery, put his hand upon deceased's shoulder, and told him that he had heard that he had been cursing and abusing his father. Deceased denied the charge, and defendant said, "there is your man," pointing to Stanley. At this juncture both Montzingo and his wife ordered them all to leave the house and yard, which they did not at once do. Montzingo then pulled off his coat, seized a new ax handle, and advanced rapidly and angrily upon Stanley. Stanley and the Turners fell back toward the gate. Montzingo, while they were retreating, struck Stanley twice or three times with the ax handle, and, upon being struck the second or third time, Stanley cut him with a knife. There is a conflict in the evidence as to the exact point at which the cutting occurred, whether inside or outside the yard. It is evident, however, that it took place very near the gate. No one was seen to strike deceased except Stanley. Defendant did not strike, or attempt to strike, the deceased, and said nothing during the rencounter between deceased and Stanley. Neither the Turners nor Stanley had any other weapons that were seen, except the knife with which the killing was done.

We have recited the main facts for the purpose of making our views of the questions of law which we find it necessary to determine the more readily understood.

At the request of the district attorney, the court gave to the jury the following special instruction: "Every man has a right to protect his house from invasion and his family from insult, and in so protecting them he has a right to use such force as may be necessary to accomplish his end, after verbal remonstrance has failed; and in the use of such force he will not be considered an aggressor or violator of the law." Abstractly considered, this charge was correct; but when given with reference to the facts of this case, we are of the opinion that it is materially objectionable.

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In the first place, the evidence did not authorize the charge upon the hypothesis that the Turners and Stanley had *invaded* deceased's house. The proof was that deceased had invited them into his house. They were in his house with his consent, and were not trespassers. They were not, therefore, guilty of an *invasion* of deceased's house in the sense in which that word was used in the charge, and it was error to convey the impression, as we think this charge does, that the entry of defendant and his companions into deceased's house was an *invasion* of it; that is, an unlawful, unauthorized entry, when the evidence showed the entry to have been with the consent and upon the invitation of the deceased. Secondly, having instructed the jury that the deceased had the right to use such force as might be necessary to expel these parties from his premises, without himself becoming the aggressor or violator of the law, the jury should have been further instructed in this connection that if deceased used greater force or more dangerous means than were necessary to effect their expulsion, he thereby himself became an aggressor and violator of the law, and no longer entitled to the immunity which the law up to that point had afforded him in the defense of his castle. We think the evidence in this case clearly demanded this further explanation of the law, to be considered by the jury in connection with the special charge given. (1 Bish. Crim. Law, sec. 859; Whart. on Homicide, secs. 552, 419, 420; *McCoy v. The State*, 3 English, Ark., 451.)

Another special charge given to the jury at the request of the district attorney is as follows: "If you believe from the evidence that defendant and Britton Turner and Tom Stanley went to the house of deceased, and cursed and swore and raised a disturbance in the yard of deceased, and were bid by deceased to leave and refused to do so, then deceased had a right to use all necessary force to put them out of his yard, and if they resisted such force they cannot justify such resistance on the grounds of self-defense." This charge is also correct in principle, but it does not go far enough. Suppose the jury should believe from the evidence that deceased used *more* force than was necessary to expel the parties, what were the rights of these parties then? Under the evidence in this case this was a most important inquiry, a most vital issue, and should have been clearly, fully and pointedly submitted to the jury by proper instructions from the court. If the deceased, in ejecting Stanley



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from his premises, used greater force than was necessary, he thereby, as we have before stated, himself became an aggressor; and to the extent of protecting himself against this excessive force the law would accord to Stanley the right of defense. This phase of the case was not submitted to the jury, and yet the evidence plainly requires that it should have been. (Whart. on Hom., sec. 552; *State v. Sloan*, 47 Mo., 604; *Guschia v. The State*, 53 Ill., 295; *King v. The State*, 13 Texas Ct. App., 277.) If Stanley acted in self-defense, and was justifiable in slaying the deceased, this defendant was also guiltless of the homicide.

These special charges, given at the instance of the district attorney, were not excepted to by defendant at the trial, nor did he ask any additional instructions, but he complained of said special charges in his motion for a new trial, and also complained that the court had failed to give to the jury all the law of the case. In our opinion the said special charges, given in the manner in which they were, separate from the main charge, and separate from each other, and without being accompanied with a further exposition of the law, in case the jury should believe from the evidence that deceased had used more force than was necessary to eject Stanley, were calculated to mislead the jury, and to materially prejudice the rights of this defendant.

It is further objected to the charge of the court that it is defective in not properly defining *implied malice*. Upon this subject the charge is as follows: "Implied malice is that inferred by law from the facts and circumstances proved in every case of intentional homicide, when the evidence fails to show that it was committed under the immediate influence of sudden passion arising from an adequate cause, or that it was excusable or justifiable in law."

In *Harris v. The State*, 8 Texas Court of Appeals, 90, implied malice is thus explained: "When the fact of unlawful killing is established, and there are no circumstances in evidence which may tend to establish the existence of express malice, nor which may tend to mitigate, excuse or justify the act, then the law implies malice, and the offense is murder in the second degree." This definition has been repeatedly approved by subsequent decisions of this court. (*Douglass v. The State*, 8 Texas Ct. App., 520; *Neyland v. The State*, 13 Texas Ct. App., 536; *Reynolds v. The State*, 14 Texas Ct. App., 427.)

It will be noticed that the definition given by the learned judge in his charge and that given in the Harris case are not

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substantially the same. Where a homicide is committed under "mitigating circumstances" malice is not implied, although the homicide may be neither excusable or justifiable. The charge omits this qualification in explaining implied malice, and in Neyland's case, *supra*, such an omission was held error. It is true that the charge excludes from the definition of implied malice a homicide committed under the immediate influence of sudden passion arising from an adequate cause, and this, it may be contended, would supply the omission of "mitigating circumstances." Whether this be so or not, it is always best to follow as near as practicable the well settled rules of the law in framing a charge upon such points, as there can then be no embarrassing questions raised as to the sufficiency of the charge in respect to such matters.

Because we think the court erred in giving, without further explanation, the two special charges requested by the district attorney, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered June 4, 1884.

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[No. 413S.]

THOMAS L. STANLEY v. THE STATE.

1. PRACTICE—CONTINUANCE.—See the statement of the case for circumstances under which it is *held* that certain applications for continuance were properly denied.
2. SAME—CASE STATED.—This case was set for trial on the third day of April. On the fifth day of that month, and while the trial was in progress, the defendant asked for a continuance to procure the testimony of a certain witness. The application showed the necessary diligence in suing out an attachment for a witness who was under subpoena, and who had been in attendance upon the court during the previous days of the term, but was found to be absent on the day set for the trial. As a fact, however, this attachment did not issue until the next day, and was then returned not served. *Held*, that, having gone into trial, the defendant was not entitled to a continuance, unless he could show that, by some unexpected occurrence since the trial began which no reasonable diligence could have anticipated, he was so taken by surprise that he could not secure a fair trial. This application, however, shows no such sur-

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- prise, and the court did not err in refusing the continuance at the stage of the proceedings at which it was asked.
3. **SAME—NEW TRIAL.**—It is a rule of practice in this State that, even when an application for continuance lacks some of the statutory requirements, if the proposed evidence appears material and true, it should be considered and weighed in connection with the evidence adduced, on the motion for new trial. This rule must be held to apply equally to an application for a continuance which, like this for instance, is irregular and unauthorized. The evidence set forth in the application in this instance being clearly material and probably true, the same should have been considered on the motion for new trial. See the statement of the case for the proposed evidence referred to.
4. **SAME—PLEADING.**—It is only when the proposed absent testimony upon which a motion for new trial is based is claimed to be newly discovered that the affidavit of the absent witness to the effect that he would testify as stated in the motion is necessary to the validity of the motion. In all other respects it is only when the State has taken issue with the defendant on the truth of the matters set forth in the motion for new trial that the trial judge is required or authorized to hear evidence by affidavit or otherwise. The affidavit of the absent witness, in this case, was not essential to the validity of the motion.
5. **MURDER—IMPLIED MALICE—CHARGE OF THE COURT.**—Upon the question of implied malice the trial court gave in this case the same charge it gave in the case of *John Turner v. The State*, ante, page 378. For the ruling which is adopted in this case, see that case.
6. **SAME—RIGHT TO REPEL INVASION OF HOME.**—Upon the right of the deceased to repel an intrusion upon his home premises, the court charged the jury "that entering into a quarrel or an angry verbal altercation with the occupant of the home premises, against his consent, in the presence of his wife and children, if he has any, would be improper conduct in the sense here used." *Held*, error, as being a charge upon the weight of evidence.
7. **CHARGE OF THE COURT—PRACTICE—CASE STATED.**—On the trial, the State proved, amongst other things, that another party, who was charged in a separate indictment with the same offense, told defendant that he would whip defendant if he did not stand up to what he had said; that the appellant did not want to go with the other parties separately indicted for this offense to the house of deceased; that defendant said he feared a difficulty if they went; that defendant *en route* expostulated against going, and that defendant was a man of peaceable disposition. In view of this and other evidence, the defense asked the following charges of the court: "If you believe from the evidence that John and Britton Turner, by threats or otherwise, exercised undue influence over the person of the defendant, sufficient to overcome the mind of an ordinary man, and thereby induced him to accompany them to the residence of the deceased, then he was excusable in being there." "If you believe from the evidence that the defendant was a mere trespasser upon the premises of the deceased, or was brought there by undue influence exercised over his mind by threats or otherwise from John and Britton Tur-

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ner, sufficient to overcome the will of an ordinary mind, and that defendant used no insulting words or threatening gestures previous to the attack of the deceased; then the deceased was not justifiable in doing him serious bodily injury except in defense of himself and family." *Held*, that whilst the charges asked were not critically correct, nor based upon such facts as would bring the case within the letter of the statute which makes duress a complete defense for acts otherwise punishable, the charges were within the spirit of that statute, and, under the peculiar circumstances of this case, their refusal was error.

APPEAL from the District Court of Houston. Tried below before the Hon. J. R. Kennard.

This is a companion case to that of *Turner v. The State*, ante, page 378; the indictment, though separate, charging the same murder, that of G. W. Montzingo, in Houston county, Texas, on the twenty-seventh day of October, 1883. The conviction, like that in Turner's case, *supra*, was for murder in the second degree. The penalty awarded in this case was, however, much greater, a term of fifty years in the penitentiary being assessed.

Fletcher Thomas was the first witness for the State. He testified that he saw the defendant in the town of Lovelady with the Turner boys and the deceased late in the evening on which the killing occurred. John Turner told Montzingo to take an ax handle and frail the defendant.

Cross-examined, the witness stated that he was not in the town of Lovelady on the morning, but saw the defendant and John and Britton Turner together in that town in the evening of the day of the killing. They were then standing in front of Saunders's saloon. Immediately after John Turner told the deceased to frail the defendant with an ax handle the witness left, and the deceased and others left a short time later. The deceased left town sober, but had, the witness thought, a bottle of whisky with him. Defendant and deceased had no difficulty *en route* home, so far as the witness knew, though they had some words concerning a saddle. Four miles is the distance from Lovelady to the deceased's house. The defendant overtook the deceased on his way home, about two miles out from Lovelady, and offered to make friends. The deceased agreed to make friends on the morrow. The defendant proposed that he would whip the deceased if he would get out of the wagon. Defendant and deceased lived between one-quarter and one-half mile apart. Witness did not know the state of feeling between them, nor the feeling between the Turner boys and the deceased.

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Arthur McManners was the next witness for the State. He testified that before sundown on the evening of the killing, he saw the deceased in the town of Lovelady. Deceased asked for a seat in the witness's wagon to ride home, and put a saddle in the wagon. The defendant asked the deceased to lend him the saddle to ride home. The deceased agreed to lend the saddle to defendant, but afterward, when it was thrown out to him, the defendant refused to take it. Afterward, when he wanted it, deceased refused to let him have it. The defendant overtook the deceased about a mile out from Lovelady, whether drunk or not the witness could not say. The deceased had whisky with him. Witness did not remember what was said by the parties about making friends. Stanley was left about a half mile distant from the house of the deceased.

Mrs. Montzingo was the next witness introduced by the State. Her testimony in this case was substantially the same as that she gave in the trial of John Turner, for the report of which see *ante*, page 378. In addition to her evidence in Turner's case, she said that when Britton Turner called by her house on the morning of the homicide, for the deceased to go with him to Lovelady, the deceased declined to go with him, because he had already promised to go with Doctor Glover. He did go to town with Doctor Glover. She did not know what, if anything, John Turner said to the defendant just before or at the time of the cutting.

Doctor Glover, for the State, repeated in substance his testimony on the trial of John Turner, and gave it as his opinion that the cutting was done inside of the yard and about two feet from the gate.

The testimony of Henry Montzingo, the next witness for the State, did not vary materially from his evidence on the John Turner trial, though it did not enter as minutely into detail.

C. P. Summers was the next witness for the State. He testified that on the night of the killing, after it had occurred, the defendant came to him and put himself under his protection. He told the witness that he had killed Montzingo. Witness asked him why he did it, and he said that he did not like to tell. He told witness that he would never get justice until his neck was broken. The defendant at that time was under the influence of whisky.

On his cross-examination, the witness said that he had known the defendant but a short time. On the night in question the

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defendant told him that John and Britton Turner were with him; that Britton Turner told him that if he did not stick up to what he had said, he would give him the d—dest whipping he had ever had. He said: "You don't know as much about this thing as I do." He further told the witness that the deceased struck him over the head and on the hand. Witness saw bruises on his head and hand, which he had tied up. Defendant declared to the witness that he had no grievance against the deceased, Montzingo. During this conversation he showed the witness a knife, with which he said he killed the deceased. The difference in the sizes of deceased and defendant, if any, was slightly in favor of the defendant. Deceased was about forty years old.

The wife of the defendant was the first witness introduced in his behalf. She testified that she was at the house of old man Turner when her husband, the defendant, returned from Lovelady. The Turner boys were then out at the lot. They and the defendant had some conversation, which the witness did not hear. She heard her husband tell the Turner boys that the deceased said for them to come to his house. John Turner then got on a horse, and told the defendant and Britton Turner to go with him. Defendant objected to going, and said that he was afraid if they went there would be a difficulty, and that he was in no condition to get into one. The party, the two Turner boys and the defendant, finally got on their horses and rode off in the direction of the deceased's house. The defendant was a man of peaceable disposition. The witness had never known him to provoke a difficulty with any one.

Bob Stevens was the next witness for the defense. He testified that late on the evening of the homicide he was watering his oxen in a deep gully near the road which ran between the houses of Turner and deceased. Witness lived on that road between the two houses named. While watering the oxen he heard and recognized the voices of defendant and John Turner. The defendant was protesting about going any further. John Turner replied: "No, we will go to the d—d old son of a b—h's house." The impression left on witness's mind was that defendant did not want to go. Witness knew the voices to be those of defendant and John Turner, though he did not see them. Witness heard cursing and loud talking at the deceased's house, and afterward saw John Turner, defendant and Buck Shaw return.

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Statement of the case.

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ing from the direction of deceased's house, John Turner then had a gun.

Doctor J. J. Woodson testified that he was called to visit the defendant after he was confined in jail. He found a bruise on his head and another on his hand, and dressed them for him. They appeared to have been inflicted by some hard instrument.

The application for continuance, which forms the subject matter of the first head note of this report, was based upon the absence of the witnesses John Stanley, of Trinity county, Lester Tims, of Walker county, and John Clark, of Houston county. The application alleged the use of due diligence, in that attachments had been issued for the first two, and a subpoena for the last witness. By the witness Lester Tims, the application alleged the defendant would prove the conversation that passed between the defendant and John and Britton Turner, and the influences that were brought to bear upon defendant's mind, compelling him to go the house of the deceased. By the witness Clark, it was alleged, would be proved the conversation between the defendant and the deceased, and the entire absence of any ill feeling between the defendant and deceased. By the witness John Stanley, who was his oldest brother, the defendant expected to prove that he, defendant, was a peaceable, law abiding, inoffensive man, who had never before been in a serious difficulty; one who was naturally timid and would avoid a difficulty, even at the risk of being stigmatized as a coward, but at the same time a man of such disposition that he could be influenced by threats or persuasion; such a man, in short, as, under the circumstances of this case, would have no mind of his own sufficient to prevail against the influences brought to bear upon him. The bill of exceptions recited error in the refusal of the continuance, wherein the court held it insufficient as an application, because not showing upon its face the materiality of the testimony; because only conversations, not the substance or facts of the conversations, were set out; because no diligence was shown, notwithstanding counsel had been appointed for the defense three days before trial, and had not caused proper process for the witnesses to be placed in the hands of the sheriff.

The trial judge signed this bill of exceptions, with explanations in substance as follows: The defendant was brought into court on the sixth, seventh and twenty-sixth days of March, 1884, for the purpose of appointing counsel. Each time he requested the

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postponement of such appointment pending his efforts to employ counsel. On each occasion he was told to procure process for such witnesses as he desired, counsel volunteering to give him assistance. When the motion for continuance was overruled, he was awarded attachments for the witnesses named in his application, and one of them, John Clark, was brought into court before the defense testimony was closed, and defendant's counsel was notified that said witness, and another named in the same attachment, were in court, but counsel declined to put them on the stand. Defendant's counsel at that time failed to have an attachment issued for the witness Lester Tims, who at that time was a resident of Houston and not Walker county; and further, that the attachments called for by counsel were not called for until April 4, although by direction of the court officers were at the service of the defendant on the third day of that month.

The application for continuance, the refusal of which was assigned as ground for new trial, and is the subject matter of the third head note of this report, was based upon the absence of the witness Buck Shaw, by whom the defendant alleged he could prove that the defendant and the deceased were on terms of friendly intimacy, and visited each other frequently; that Buck Shaw was at Turner's house on the evening of the homicide, and the sisters of the Turners besought him, Shaw, to go and bring the boys back and prevent a difficulty; that when said Shaw reached the house of the deceased, defendant was retreating and deceased was following him up, "whaling" him over the head with an ax handle; that the witness Shaw and the sister of John and Britton Turner had frequently visited the house of the deceased; that illicit intercourse was practiced by them, which fact was discovered by deceased and reported to old man Turner, the father of said John and Britton Turner, which said disclosure created hard feelings between said John and Britton Turner and the deceased, and that an unfortunate circumstance afterward occurred in the family of old man Turner, to-wit, the birth of a child to his said daughter.

The motion for new trial brought into review the questions discussed in the opinion.

*W. A. Stewart and S. A. Denny*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.



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Opinion of the court.

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WHITE, PRESIDING JUDGE. It appears from the record that this case was called and proceedings preliminary to the trial commenced on the third of April. One or more motions for continuance were made prior to the announcement of ready for trial by defendant, and were overruled. These applications, when considered in the light of the judge's explanations of his rulings upon them, and in connection with the evidence adduced on the trial, do not appear to have been improperly refused.

On the fifth of April, and whilst the trial was in progress, the defendant made another application for a continuance on account of the absence of one Buck Shaw, showing all the necessary and requisite diligence in suing out an attachment when the witness, who was under subpoena and had been in attendance on previous days of the term, was found to be absent on the third of April, the day the case was set for trial. This attachment, however, did not issue in fact until the fourth, and was on the same day returned not executed, because the witness could not be found.

Having gone into the trial, the defendant was not entitled to a continuance unless he could make it appear, to the satisfaction of the court, that by some unexpected occurrence since the trial commenced, which no reasonable diligence could have anticipated, the appellant was so taken by surprise that a fair trial could not be had. (Code Crim. Proc., Art. 568.) No such surprise is shown in the application before us, and the court did not err in overruling it at the stage of the proceedings at which it was presented.

Not being a regular, or, we may say, an authorized application for continuance, was it entitled to any consideration in connection with the other evidence, when the court was asked to grant a new trial, as would have been the case had said application been presented at the proper time? (Code Crim. Proc., Art. 560, subdiv. 6.) We are not aware that this exact question has ever been before the court. We find, however, that in more than one instance when an application has lacked some one of the statutory requirements, but the proposed evidence appeared material and probably true, it has been held that it should have been considered and weighed on the motion for new trial. And the same rule, we think, should apply here. In explaining why it was not considered on the motion for new trial, the learned judge does not base his action on the fact that the application was not authorized by law, but seems to rely for his

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action mainly upon the fact that, in support of this ground of his motion for a new trial, the defendant failed to produce the affidavit of Buck Shaw, the absent witness, to the effect that he would testify as was proposed in the application for continuance, or what facts he would testify to if a new trial should be granted. If the evidence had been claimed as newly discovered, then, indeed, the supporting affidavit of the proposed witness would have been requisite to the validity of the motion. (Code Crim. Proc., Art. 777, subdiv. 6; Clark's Crim. Law of Texas, p. 571, note, sec. 6.) In all other respects, it is only when the State has taken issue with the defendant upon the truth of the causes set forth in the motion for new trial that the judge hears evidence by affidavit or otherwise, to enable him to determine the issue. (Code Crim. Proc., Art. 781.) When not controverted, and not based upon newly discovered evidence, no supporting affidavits are required. If the State took issue on and controverted the motion in this case, the record fails to show it. In our opinion the proposed evidence of Buck Shaw was material, and, considered in connection with other testimony shown in the record, was probably true. Nor does it answer the purposes for which his testimony was sought to say that the wife and son of the deceased had testified to many of the facts to which he was expected to bear witness. The witness Shaw was the only other eye witness to the transaction except deceased's wife and son, and they became involved in it as participants before it was over. It may have been all important to defendant to have a witness detail the occurrences of the transaction who was not a participant in it in any way.

The charge of the court is quite voluminous, and many propositions of law are submitted which, in our opinion, were irrelevant to the case as made by the facts proven, and were calculated to confuse, if not to mislead, the jury. This is, in a measure, we suppose, attributable to the fact that the learned judge had only a short time before tried another branch of this case wherein the relations of the parties to the transaction were somewhat variant from those presented in this record. Some of the errors pointed out in the John Turner case (*ante*, p. 378) have been corrected in the charge in this case, but the same charge upon "implied malice" was given, and we refer to that case for a discussion of its sufficiency. With the exception of one or two particulars to be mentioned, we are of opinion that it submits correctly the law upon the main features of the case.

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Opinion of the court.

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In charging upon the rights of a party in defense of his home and premises against the intrusions of trespassers or those guilty of improper conduct after entering by invitation of the owner or occupant, the learned judge, we think, infringes upon the province of the jury by declaring as law a matter which they alone should have determined, if so, as matter of fact, in instructing them "that entering into a quarrel or any angry verbal altercation with the occupant of the home premises, against his consent, in the presence of his wife and children, if any he has, would be improper conduct in the sense here used." We are of opinion that this instruction was a charge upon the the weight of evidence, and, taken in connection with the context, was calculated to impress the jury that defendant had been guilty of such improper conduct as warranted the deceased in the exercise of extreme means and force to eject him from the premises.

On the trial, the State proved the statements of the defendant Stanley made to one Summers after the homicide. Amongst other things, appellant told the witness that Britton Turner, a party who was indicted in another case for this same murder, said that "if he (Stanley) did not stick up to what he said, he would give him the d—dest whipping he ever had." It was in proof that appellant did not want to go with the Turners to the house of deceased; that he said he was afraid, if he went, they would get into a difficulty; that he was a man of peaceable disposition, and that, after they started to the deceased's house, appellant expostulated with the others, and did not want to go. In consideration of these facts and other evidence in the record, defendant's counsel requested special instructions from the court to the jury, which were refused. These instructions were: "If you believe from the evidence that John Turner and Britton Turner, by threats or otherwise, exercised undue influence over the person of Thomas Stanley, sufficient to overcome the mind of an ordinary man, and thereby induced Thomas Stanley to accompany them to the residence of G. W. Montzingo, then he was excusable in being there." Again: "If you believe from the evidence that Thomas Stanley was a mere trespasser upon the premises of G. W. Montzingo, or was brought there by undue influence exercised over his mind by threats or otherwise from John and Britton Turner, sufficient to overcome the will of an ordinary mind, and that Stanley used no insulting words or threatening gestures previous to the attack of Montzingo, then

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G. W. Montzingo was not justifiable in doing him serious bodily injury, except in defense of himself and family."

Now, whilst these instructions were not, perhaps, critically correct, and were based upon a state of facts which would not bring the case within the letter of the statute which makes duress a complete defense for acts otherwise punishable (Penal Code, Art. 43), still we believe they are within the spirit of that statute, and, under the peculiar circumstances of the case, should have been given in charge to the jury.

Several other errors are assigned, but the questions are such as are not likely to arise on another trial. Because of those discussed, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 4, 1884.

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[No. 3147.]

ANDERSON N. JOHNSON v. THE STATE.

1. **THEFT—INDICTMENT.**—Under the statute in force prior to the adoption of the Revised Codes, the theft of a gelding was a specific offense. The word "horse" was not used in that statute in its comprehensive and generic sense, and did not include a "gelding," "mare" or "colt." Indictment for the theft of a gelding, presented before the adoption of the Revised Codes, properly described a stolen animal as a "gelding."
2. **SAME—PRACTICE—REPEALED LAWS**—The effect of Article 726 of the Revised Penal Code was to include in the generic term "horse" all animals of the horse kind, as distinguished from ass or mule, and to the extent of destroying all legal distinctions between the animals embraced, it operates to repeal the statute previously in force. The Final Title to the Revised Statutes, by express provision, prescribed for pending cases, both civil and criminal, the following rule: "No offense committed, and no liability, penalty or forfeiture, either civil or criminal, incurred prior to the time when any statute, or part thereof, shall be repealed or altered by the Revised Statutes, shall be discharged or affected by such repeal or alteration; but prosecutions and suits for such offenses, liabilities, penalties or forfeitures, shall be instituted and proceeded with in all respects as if such prior statute or part thereof had not been repealed or altered except that where the mode of procedure or matters of practice have been changed by the Revised Statutes, the procedure had after the Revised Statutes shall have taken effect in such prosecution or suit shall be as far as practicable, in accordance with the Revised Statutes." Under

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this rule it was necessary in this case that the proof should have supported the allegation that the animal stolen was a "gelding," because the theft was committed before the revision of the Codes, and the indictment described the animal as a gelding.

3. **SAME—EX POST FACTO LAW.**—To apply the new provision (Article 746 of the Revised Penal Code) in a trial for horse theft committed before the Revised Codes took effect would be *ex post facto*, and it has been properly *held* that a variance between the allegation and the proof is fatal to the conviction, notwithstanding the trial was held, since the Revised Statutes took effect.
4. **SAME—FACT CASE.**—See the statement of the case for evidence *held* insufficient to support a conviction for theft of a gelding, inasmuch as it fails to establish the identity of the defendant as the thief, beyond a reasonable doubt.

**APPEAL** from the District Court of Houston. Tried below before the Hon. J. R. Kennard.

The indictment in this case was filed in the district court of Houston county on the twenty-fifth day of November, 1876. It charged that the appellant, on the twenty-first day of August, 1876, did steal a certain gelding, the property of one Amanda Brown. The trial was had at the March term, 1884, of the district court, when the appellant was convicted, and his punishment was assessed at a term of five years in the penitentiary.

Mrs. Amanda Walker was the first witness for the State. She testified that her name in August, 1876, was Amanda Brown. She was well acquainted with the defendant, and pointed him out in court. The witness first saw the defendant in the early part of the year 1876, when he came to witness's house, and contracted with her then husband, Mr. Brown, to make a crop on the place. The defendant remained at the house of the witness and Brown until some time in July, 1876, when he left and went to Mrs. Bruce's to live, having previously sold his crop. Since some time in 1876, until his trial, the witness has not seen the defendant. The defendant was fleshier at the time of his trial than he was in 1876, and wears a somewhat heavier beard. In 1876 the defendant passed under the name of Jim Johnson.

On the night of the twenty-first day of August, 1876, the witness lost a cream colored horse, in Houston county, Texas. The defendant was at the house of the witness and Brown on that night about nine o'clock. He passed through the room in which the witness was sitting at the time, but said nothing to the witness. The witness's horse at that time was staked out in the

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Statement of the case.

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field. She saw the horse in question late on that evening, and missed him about sunrise, or a little later, the next morning. The witness's former husband, Mr. Brown, died in July, 1876, and the horse was the property of his estate, and was not the separate property of the witness. The witness administered on the estate of her deceased husband, but did not now remember when she qualified as administratrix—whether before or after the theft of the horse. She had the absolute control and possession of the horse, and he was taken from that control and possession without the knowledge or consent of the witness. Mrs. Bruce, the lady previously spoken of, lived a short distance from the house of the witness, and the defendant lived at Mrs. Bruce's from the time he left the witness's house in July, 1876, until the horse was missed. At the same time that the horse disappeared the defendant disappeared. His saddle and his saddle bags disappeared at the same time. He had no horse. The defendant was married to Mrs. Bruce's daughter, and lived at Mrs. Bruce's house after his marriage until he disappeared.

On cross-examination by the defense, the witness stated that she did not see the defendant take her horse, and never saw him in possession of the horse after the animal disappeared. On the same night that the defendant stole witness's horse, a man named Parker stole the defendant's wife.

Robert Hale was the second witness introduced and sworn by the State. He testified that he lived in Houston county, Texas, near the residence of Mrs. Amanda Walker, formerly Mrs. Amanda Brown. He knew the defendant, and he knew the horse that the defendant is charged to have stolen from Mrs. Brown. At this point the witness was directed by counsel for the State to point the defendant out in court. He pointed out a man who sat some three or four feet from the defendant. He was again directed to point out the defendant, and he again pointed out the man who sat some three or four feet distant from the defendant. The counsel for the State then pointed to the defendant and asked the witness if he was not the man Johnson, and the witness answered that he was. Mrs. Walker, then Mrs. Brown, he stated, lost a clay bank horse some time during the month of August, 1876. The next day after the horse was taken the witness went to where, on the night before, he was staked in the field, and tracked him out at the back of the field, up to Mrs. Bruce's house, and thence to the town of Palestine, in Anderson county, where the witness lost the track, A

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part of one of the hoofs of the horse was so broken off that his foot made a very peculiar and a very easily followed track. The witness was of opinion that the defendant owned no horse at the time of the theft of Mrs. Brown's horse. He had, a short time before this, contracted with a party to do some clearing, for which he had been given a horse, but he failed to perform his part of the contract, and the party with whom he contracted took the animal back. The witness first saw the defendant in 1876, when he engaged to make a crop on Mrs. Brown's place. After that the witness saw the defendant occasionally until he disappeared in the same year, since when the witness had not seen him until on this trial. The woman that Parker is supposed and said to have taken off lived at Mrs. Bruce's.

Cross-examined by the defense, the witness said that he never saw the defendant in possession of the missing horse, and did not know that the defendant took that horse.

Wyatt Lane was the next witness sworn for the State. He testified that he lived in Houston county, Texas, in 1876, about three miles from the house of the prosecuting witness, Mrs. Walker, then Mrs. Brown. One night in the month of August of that year, 1876, while the witness and his wife were occupying a bed on the gallery of their house, some one on horseback passed the house. The witness recognized the horse as Brown's old saddle horse, and remarked to his wife: "Frank Brown is worse, and yonder is some one going for the doctor." Witness said nothing to the party riding the horse. No one was with the man on the horse. Witness did not recognize the man. The witness could not say what time of night it was, though guessing it was about twelve o'clock. He had been asleep and was awakened by the barking of his dog. The road was about fifteen steps from the gallery where the witness and his wife were lying. The defendant is the man who worked at Mrs. Brown's in 1876. The witness only knew him by sight, and saw him only occasionally.

Cross-examined by the defense, the witness stated that he never saw the defendant in possession of the horse, and did not know of his own knowledge who took the animal.

F. H. Bayne was the next witness introduced on behalf of the State. He testified that he was the sheriff of Houston county, Texas. The State's counsel asked the witness if he had ever had a *capias* for the arrest of the defendant, and whether or not he had ever made search for the defendant and failed to find him,

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Statement of the case.

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and directed the witness to state when and where and under what circumstances the defendant was arrested. To these questions the counsel for the defense interposed strenuous objection, which being overruled, the witness stated in reply that a *capias* for the arrest of the defendant was placed in his hands, and as sheriff he made diligent search for the defendant and failed to find him in Houston county. He then transmitted the *capias* to the sheriff of Freestone county, who arrested the defendant and lodged him in the Houston county jail. The defendant was afterward released on bail, and in November, 1883, was re-arrested by the sheriff of Freestone county and re-lodged in the Houston county jail. The witness did not know that the defendant was avoiding arrest.

Mr. Childs was the next witness introduced and examined by the State. He testified that he was the sheriff of Freestone county, Texas. He knew the defendant. The defendant was first arrested in Navarro county. He was arrested the last time in Montague county. The defendant's father resided in Freestone county, and offered a reward of one hundred dollars for the re-arrest of defendant after he was released on bond on his first arrest. Defendant was a married man and had two children. Over the objection of the defense the witness was permitted to testify that he received a *capias* for the arrest of the defendant from Houston county, but failed, after search, to find him in Freestone county.

The State then introduced in evidence the judgment *nisi* of September, 1883, forfeiting the defendant's appearance bond. The State closed.

Colonel John B. Payne was the first witness for the defense. He testified that he resided in Navarro county, Texas, in 1876. He knew the defendant's father, who lived some eight or nine miles distant from the witness's house. He also knew the defendant, and had known him for many years. It had long been the custom of the witness to hire the hands he worked about the last of January or first of February of each year, and to employ them for five or six months. The witness was afflicted with a bad and uncertain memory, and could not say positively, but believed that it was in the year 1876 that he had had the defendant employed. He employed him in January or February, and he stayed with witness until the following July. The defendant's reputation for honesty was good in the community in which he was reared.



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Statement of the case.

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A. M. Carter was the next witness introduced and sworn for the defense. He testified that he lived in Freestone county, and lived there in 1876. He knew the defendant's father, from whom he lived about eight miles distant. He had known the defendant pretty much all of his life, say about twenty-five years. About the last of July or the first of August, either in 1875 or 1876 (the latter year, the witness believed), he hired the defendant to help him run a thresher, and from that time until the last of August the defendant worked at the thresher for him. The witness ran a thresher but one season, and that was the same year that J. A. Bounds purchased a thresher and commenced operating it, and that year was either the year 1875 or the year 1876, which the witness could not now be certain, but he was of impression that it was the latter year. At all events he had run a thresher but one year since the war, and that was the year that Bounds purchased his, and the same year that defendant worked for him. Witness met the defendant in the town of Wortham, Freestone county, Texas, in the month of July before the August in which the defendant entered his service. The defendant's character for honesty up to the time this charge was preferred against him was perfectly good. Witness had never heard his honesty impeached before.

J. A. Bounds was the defendant's next witness. He testified that he lived in Freestone county, and lived in that county during the year 1876. Witness purchased a thresher in 1876, and ran it that year and for several succeeding years. The witness at that time lived about thirteen miles distant from the house of the previous witness, Carter. Carter operated a thresher the same year that witness purchased and commenced the operation of his, which was the year 1876. Witness remembers this, because he started to make a drive in Carter's neighborhood, when he found that Carter had purchased and was operating a thresher. He then turned his thresher into another course. The witness did not know that Carter ever run his thresher before this year, but was of impression that he, Carter, run it after 1876. Such, at least, was the understanding of the witness. The witness had known the defendant for some fifteen or sixteen years. Until the defendant was charged with the theft of the horse in this case, his reputation for honesty was as good as that of any person known to the witness.

Mrs. Johnson, the mother of the defendant, testified, in his behalf, that she still lived in Freestone county, on the same place

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she lived in 1876. The witness did not know of her own knowledge where the defendant worked or stayed all of the time during the year 1876, but was under the impression that he worked for Colonel John B. Payne. He and Colonel Payne's son frequently came to the witness's house together during the summer of 1876. Some time during that year the defendant helped Mr. Carter run a threshing machine. About the last of August or first of September of that year, the defendant left the witness's house to go out west. It was the recollection of the witness that the defendant worked at Mr. Longbotham's during the year 1875. In May, June and July, 1877, he worked on the witness's place. He married in the fall of 1877. The witness had never heard of the defendant being or living in Houston county, until he was arrested under the charge on which he is now tried.

Jasper Steadman was the last witness examined in the case. He testified, on behalf of the defendant, that he had known the defendant for twelve years, and knew that his reputation for honesty, until arrested on this charge, was perfectly good. The witness lived in Freestone county. About the last of August or first of September, 1876, the witness met the defendant in Navarro county, Texas, about twenty miles from defendant's father's house, going out west. He had no horse, and was traveling on foot.

The motion for new trial called in question the sufficiency of the evidence to support the conviction, the action of the court in admitting the testimony of the sheriffs of Houston and Freestone counties regarding the issuance of *capias* for the arrest of the defendant, and his arrest, and the correctness of certain paragraphs of the charge. The motion was overruled.

*Maxcy & Maxcy and Cooper & Cooper*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. This prosecution was commenced by indictment presented and filed November 25, 1876, and the charge preferred in said indictment was "that Anderson N. Johnson, on the twenty-first day of August, 1876, in the county of Houston aforesaid, *one gelding* of the value of seventy-five dollars, the corporeal personal property then and there of Amanda Brown, fraudulently and feloniously did take, steal and carry away," etc. At the time this offense was alleged to

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have been committed, theft of a *gelding*, as distinguished from theft of a *horse*, was a specific offense, made so by the statute of 1858, which provided that, "If any person shall steal any horse, gelding, mare, colt, ass, or mule, he shall be punished," etc. (Pas. Dig., Art. 2409.)

Construing this statute, our Supreme Court, in *Banks v. The State*, 28 Texas, 644, say: "The word 'horse,' in the Article cited, was not intended to be used in its comprehensive and generic sense, and it was used as synonymous with the word 'stallion,' or, at least, it was not in that connection intended to include 'gelding, mare or colt.' It is our duty to give to the Article such construction as will give effect and meaning to each word, as nearly as can be consistently done with the object and purpose of the Legislature. The statute itself, in creating and providing for the punishment of the offense, appears to fix its own meaning to the words used. It specifically describes the different species of property by the use of the words 'horse, gelding, mare, colt, ass, or mule,' evidently discriminating between them as different species of property, and as much between horse and mare as between horse, ass, or mule. The averments of the indictment must be equally specific, *and the proof must correspond with the averment.*" Many subsequent decisions to the same effect have since been made. (*Keese v. The State*, 1 Texas Ct. App., 298; *Lunsford v. The State*, Id., 448; *Parsons v. The State*, 3 Texas Ct. App., 240; *Brisco v. The State*, 4 Texas Ct. App., 219, and authorities cited.)

Under Article 746 of our Code, adopted as part of our Revised Statutes in 1879, the generic word "horse" is used as embracing all the horse species as distinguished from "ass or mule," and this is the statute now in force. It repealed the previous statute, it is true, so far as the distinction between the different members of the horse family had theretofore existed; but by express provision of the "Final Title" to the Revised Statutes, a rule was prescribed for pending cases both civil and criminal, to the effect "that no offense committed, and no liability, penalty or forfeiture, either civil or criminal, incurred prior to the time when any statute, or part thereof, shall be repealed or altered by the Revised Statutes, shall be discharged or affected by such repeal or alteration; but prosecutions and suits for such offenses, liabilities, penalties or forfeitures shall be instituted and proceeded with in all respects as if such prior statute, or part thereof, had not been repealed or altered, except that where the mode of pro-

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cedure or matters of practice have been changed by the Revised Statutes, the procedure had, after the Revised Statutes shall have taken effect, in such prosecution or suit shall be as far as practicable in accordance with the Revised Statutes."

In the case before us the charge in the indictment being "theft of a gelding," and that being a descriptive allegation of a specific offense under the law at the time in force, the proof should have corresponded with the allegation, and being descriptive of the identity of the offense, the prosecution was bound to sustain it by the proofs. This was not done. Nowhere in the proofs do we find any evidence that "the horse" proven to have been stolen was "a gelding."

This identical question was decided by this court in *Velasco v. The State*, 9 Texas Court of Appeals, 76, in which it was held that to apply the new provision, Article 746 of the Revised Penal Code, in a trial for horse theft committed before the Revised Codes took effect, would be *ex post facto* (citing *Calloway v. The State*, 7 Texas Ct. App., 585), and that a variance between the allegation and the proof is fatal to the conviction, notwithstanding that the trial was had since the Revised Codes took effect. On the ground of variance thus manifest, the judgment must be reversed.

On the sufficiency of the evidence, in addition to the fact that defendant raised a serious question as to his personal identity, it is made to appear that on the night the horse was stolen one "Mr. Parker stole defendant's wife," or the wife of the man defendant was supposed to be. And whilst defendant disappeared himself that night, and his saddle bags and saddle also disappeared, it is not improbable, and not altogether unreasonable in the absence of proof, that Mr. Parker wanted a horse to carry the woman off on, and, being so wholly regardless of defendant's domestic rights, he might have concluded further not to respect his property rights in the saddle and saddle bags, which articles he could perhaps utilize to advantage with the horse in his purposes and intent to rob the man of his wife.

We would not do intentional injustice to Mr. Parker, but these suggestions are thrown out because the disappearance of the saddle and saddle bags on the night the horse and woman were stolen are the principal inculpatory facts in the record against defendant, and whilst they may be pertinent and strong circumstances if his identity be established, they do not of them-

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Syllabus.

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selves exclude every other reasonable hypothesis but that of his guilt, as we have endeavored to show.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 11, 1884.

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[No. 3181.]

R. J. GOODE v. THE STATE.

1. **UNLAWFUL SALE OF ESTRAY ANIMALS—CHARGE OF THE COURT.**—INDICTMENT comprehended the two counts of selling the estray animals without having given legal notice of the sale, and of selling the same when three adult bidders besides the family of the taker up were not present. After the evidence was submitted the State abandoned the first count, and elected to proceed on the second, notwithstanding which the court charged, in effect, that if the jury believed the defendant sold the said animals without having given legal notice, they should convict. *Held*, that such question was no longer in issue, and the defendant promptly excepting, the charge was erroneous upon the elementary principle that the charge of the court should be confined to the issues to be tried.
2. **SAME—PRACTICE.**—The liability of the court to mislead the jury and prejudice the rights of the accused by extending the charge beyond the issues involved in the trial, is the reason of the rule. When, then, the defendant has excepted to such a charge, and doubt arises as to how far the defendant may have been prejudiced by it, the duty of reversing the judgment is imposed upon this court. To defeat the enforcement of this rule, it must manifestly appear that the charge, though wrong, did not influence the verdict of the jury.
3. **SAME—CONSTRUCTION OF A TERM—CHARGE OF THE COURT.**—To the law (Rev. Stats., Art. 4588) regulating the sale of certain estray animals is appended a proviso which, in effect, forbids the sale, even under legal notice, unless there be present at the sale at least three adult bidders besides the members of the family of the taker up. In the charge authorizing the jury to convict in the event they believed that three adult bidders besides the members of the defendant's family were not present at the sale, the court declined to instruct as to what constitutes a "family," but declared that question to be a matter of proof, and authorized the jury to construe the meaning of the term for themselves. *Held*, error; that the term, when applied to a particular state of facts, is a mixed question of law and fact; that it is the province of the court to declare the law, so far as the fact is governed by law, and so far as the fact is a

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question of proof, it is to be deduced by the jury from the evidence, and not from their personal knowledge.

4. SAME.—In the construction of Article 4583, Revised Statutes, regarding the sale of certain estrays, the word "family" is *held* to mean the collective body of persons who live in one house, under one head or manager.

APPEAL from the County Court of Bell. Tried below before the Hon. W. M. Minyard, County Judge.

The indictment in this case was originally presented in the district court, but was transferred to the county court, as the court of proper jurisdiction. It charged the appellant with the violation of the estray laws, in two counts: 1. That he unlawfully sold certain estray animals, without having first given legal notice of such sale; and 2, that unlawfully he sold the said animals at a sale which was not attended by three adult bidders besides the members of his family. The trial resulted in the conviction of the appellant under the second count, the first having been abandoned by the State, and the punishment assessed by the jury was a fine of one hundred and fifty dollars.

The opinion sufficiently discloses the case.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. The appellant was convicted for unlawfully selling estray animals, without complying with the laws regulating estrays. (Penal Code, Arts. 770 and 771).

The charge in the indictment was that appellant did "unlawfully sell and dispose of said estray cattle without first having given legal notice of the said sale," \* \* \* and "that he did unlawfully sell and dispose of said estray cattle, at which said sale were then and there less than three adult bidders present besides the family of the said R. J. Goode, the taker up," etc. After the evidence and before the argument, the county attorney abandoned the count in the indictment charging the defendant with selling without giving legal notice, and left the case to rest solely upon the charge that the sale was made when there were less than three adult bidders, besides the members of appellant's family, present.

Notwithstanding the charge was thus narrowed to the single issue, the court, in his instructions to the jury, after giving them

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in charge Article 4583, Revised Statutes, instructed them "that if they believed from the evidence that the defendant sold the stock mentioned in the indictment without giving the notice required by law, they would find him guilty." Defendant saved his bill of exceptions to this charge, and presents it as error. There is no doubt that the charge was erroneous, if for no other reason, solely upon the ground that it submitted an issue which was no longer in the case, and the rule is elementary that the charge should be confined to the issues to be tried. (*Markham v. Carothers*, 47 Texas, 22.) The judge in his charge shall distinctly set forth the law applicable to the case (Code Crim. Proc., Art. 677), and whenever he goes outside the case to hunt up and instruct the jury upon matters not involved in the case, he is not only liable to mislead the jury, but to prejudice the rights of the defendant. How far the defendant has been prejudiced in this instance we are unable to say. Evidently the court disregarded a plain rule of practice, and defendant promptly saved his exception by bill at the time. (Code Crim. Proc., Art. 685.) Under such circumstances, in cases of doubt as to how far a defendant has been injured by such error, it would seem to be our duty to reverse the case under the provision of the statute just cited. Where the charge is wrong it must appear manifest that the verdict was not influenced by it, or the verdict will be set aside. (White & Willson's Con. Rep., sec. 1127, citing *Chandler v. Fulton*, 10 Texas, 2; 1 Cal., 352.)

Full provision is made by statute for the sale of estray animals. (Rev. Stats., Arts. 4570, *et seq.*) Amongst other things it is provided that "any citizen taking up any stray hogs, sheep, goats or cattle other than work oxen, shall proceed in the same manner as is required in the case of horses, etc., except advertising in a newspaper; and any person estraying the same, at the expiration of six months from the day of appraisement, shall proceed to give notice as in the case of sheriffs' or constables' sales, and sell such estrays where they were taken up; *provided*, there be not less than three adult bidders in attendance at such sale beside the family of the taker up." (Rev. Stats., Art. 4583.)

At the sale made by defendant in this case, McBurnet, a witness for the State, says: "There was present at the sale, besides R. J. Goode, the defendant, his sons, F. F. Goode, R. J. Goode, and myself. I married defendant's sister. Both of his sons bid on the cattle, and I bought them in for seventy-one dollars. I

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was not bidding for myself, but for defendant, and bought the cattle for the defendant. I paid the defendant's money for the cattle. Both of the sons of the defendant, F. F. Goode and R. J. Goode, are grown, and live to themselves. \* \* \* Neither of the sons lived on the place with the defendant, and they each made his own living. One of the sons is married and the other is not. The unmarried son is the younger, and has been working and trading for himself for over two years. He is about twenty-three years old."

It became a question, in view of this evidence, whether or not there were present at said sale "three adult bidders" beside the family of the taker up. Defendant's special requested instructions upon this point were as follows:

"1. The family consists of those who live together in the same house, subsisting in common, directing their attention to a common object, the promotion of their mutual interest and social happiness.

"2. If you believe from the evidence that there were three adult bidders present (at said sale) besides the family, as the family is above defined, or if you have a reasonable doubt of this (fact), you will acquit the defendant."

These instructions were refused, and the charge given by the court on this point was as follows: "Gentlemen of the jury, if you believe from the evidence that there were less than three adult bidders in attendance at the sale, at the time defendant sold the cattle mentioned in the indictment, beside the family of defendant, you will find him guilty, etc. I will not give you any charge as to what constitutes a man's family. You can just put your own construction on that. It is a matter of proof." A bill of exceptions is also saved by the defendant to this charge of the court.

The charge was erroneous. What is intended in the statute by the words "the family of the taker up," is, when applied to a particular state of facts, a mixed question of law and fact. So far as the fact is governed by law, it belongs to the judge to declare the law, and so far as the fact was one of proof, it was a matter to be ascertained from the evidence, and one not to be left to the personal knowledge of the jury. (*Green v. Hill*, 2 Texas, 465.)

What is a "family" in contemplation of the statute? Mr. Webster defines the word "family" to mean "the collective body of persons who live in one house or under one head or manager";



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or household." Mr. Bouvier defines it to be "all the individuals who live under the authority of another, including the servants of the family."

Our Supreme Court has, in several instances, had occasion to discuss the meaning of the word as used in reference to homestead and other exemptions. In *Wilson v. Cochran*, 31 Texas, 677, it is said: "It was most certainly used (in the Constitution) in its generic sense, embracing a household composed of parents and children or other relatives, or domestics or servants; in short, every collective body of persons living together within the same curtilage, subsisting in common, directing their attention to a common object—the promotion of their mutual interests and social happiness. \* \* \* It is, besides, the most popular acceptation of the word." But it is said in *Whitehead v. Nicholson*: "The mere temporary and indefinite union of persons in one household, directing their attention to a common object—the promotion of their mutual interests and social happiness—does not constitute a family within the meaning of the Constitution." In *Howard v. Marshal* it is held that the Constitution "had in view a family composed of husband, wife and children" (48 Texas, 478), and this same doctrine is reaffirmed in *Roco v. Green*, 50 Texas, 483, wherein it is further said: "We think that the law contemplated—as a general rule at least—that as the older members of the family grew up and married, or moved off and left the paternal roof, the legal relation of a family as it had formerly existed ceased, and that other and new relations and families would spring up."

In the construction of the statute regulating the sale of estrays (Rev. Stats., Art. 4583) we are of opinion the word "family" would mean the collective body of persons who live in one house under one head or manager. (52 Iowa, 431; 53 Id., 706; s. c., 36 Am. Rep., 248 and note.)

Because the court erred in its charge to the jury in the matters discussed, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 7, 1884.

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Opinion of the court.

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[No. 3137.]

## GRANVILLE HARWOOD v. THE STATE.

1. **PRACTICE IN THE COURT OF APPEALS.**—A conviction cannot stand in this court when the transcript fails to bring up an indictment or information.
2. **SUBSTITUTION OF LOST INDICTMENT.**—Where an indictment has been accidentally destroyed after trial and conviction, it may be supplied either by a second indictment or by substitution in the mode provided by law.

APPEAL from the County Court of Johnson. Tried below before the Hon. D. T. Bledsoe, Special County Judge.

The conviction in this case was for aggravated assault and battery, and the penalty imposed was a fine of four hundred dollars and confinement in the county jail for the period of twelve months.

The Reporters have received no brief for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** There being no indictment or information in the record in this case, there is no legal foundation for the judgment of conviction, and it cannot, therefore, be permitted to stand. It appears that, after the conviction was had, the indictment was destroyed accidentally. It may yet be supplied, either by a second indictment by the grand jury, or by substitution in the mode provided by law. (*Turner v. The State*, ante, p. 378; *Schultz v. The State*, 15 Texas Ct. App., 258.)

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 11, 1884.

## Statement of the case.

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[No. 3182.]

## ROBERT MILLER v. THE STATE.

1. BURGLARY—THEFT—INDICTMENT—PENALTY.—It is no objection to an indictment that it charges both burglary and theft, but a conviction cannot be had for both offenses when thus charged in the same indictment, and a separate punishment assessed for each, or a joint punishment assessed for both. The correct doctrine has been thus stated: "If both (burglary and theft) are charged in one indictment, it is clear that the theft would be included in the burglary, and that no judgment could be rendered for the theft; and, in such a case, the conviction for burglary would be a bar to a subsequent prosecution for theft."
2. SAME—VERDICT.—The indictment charging both burglary and theft, and the verdict being "guilty as charged in the indictment," the defendant stands convicted of both offenses, notwithstanding the presumptive intention of the jury to convict of burglary alone, inasmuch as the punishment assessed is the *minimum* prescribed for that offense. The issue of theft was not submitted by the charge. The court adjudged the defendant guilty of "robbery," and sentenced him for theft and burglary. *Held*, that the verdict cannot stand, inasmuch as it is not warranted by the charge, and because, though it is conformed to by the sentence, it is not by the judgment. See the opinion *in extenso* on the subject.

APPEAL from the District Court of Bell. Tried below before the Hon. B. W. Rimes.

The indictment charged the appellant with the burglary of, and theft from, the house of one G. W. Klotts, in Bell county, Texas, on the twenty-seventh day of January, 1884. He was found guilty as charged in the indictment, and was awarded a term of two years in the penitentiary as punishment.

G. W. Klotts was the first witness for the State. He testified that he lived in Bell county, Texas. He was a farmer, and lived in an isolated house, his nearest neighbor, Mr. R. W. Scott, living in a house some three or four hundred yards distant. The witness kept no locks on his doors, but was in the habit of fastening them with latches. On the afternoon of Saturday, January, 1884, the witness took his wife and went to spend the Sabbath (next day) with his wife's father. Mr. Scott had consented to feed the witness's stock, and look after his place, during his absence. The witness positively knew that when he left his house on Saturday evening he left every window down and every door closed and latched. It was an utter impossibility for

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any one to enter that house during the absence of the witness without either raising a window or opening a door.

The witness left in his house, on the occasion spoken of, household and kitchen furniture exceeding in value the sum of fifty dollars. Among other things the witness left in his house an album which belonged to him, and which contained gem pictures and other likenesses of his family and relatives. The album was worth perhaps seventy-five cents or one dollar. It was left in a trunk inside the house.

When the witness and his wife returned to their house on Sunday afternoon they found the doors still shut and the windows still down. Within the next two or three days the witness found that during his absence his trunk had been opened, its contents disordered and the album removed. The witness then began his inquiries, and, acting on certain information he received, he went to Mr. Alfred Ford's, and there found the defendant. Mr. Ford returned the album. Mr. Scott, who was with the witness, identified the defendant, and he was arrested. This was on the Sunday following the Sunday witness and his wife spent with his wife's father. The defendant on trial was the man arrested at Ford's house. The witness had never seen the defendant before the arrest, but had a description of him. The house of the witness was entered during his absence, and the album taken without the knowledge or consent of the witness. The defendant made no statement at the time he was arrested.

R. W. Scott was the next witness introduced by the State. He testified that he lived in Bell county, Texas, some three or four hundred yards from the house occupied by State's witness Klotts. It was a prairie country, and the two houses were plainly in sight of each other. Klotts and his family were gone all day from home on Sunday, January 27, 1884. Witness did not know at what time they left on the evening before. In the forenoon of the Sunday on which Klotts was absent, the witness, who was standing at his horse lot, saw a negro riding a free traveling gray horse in the direction of Klotts's house. In a short while the witness observed the gray horse hitched to the post at the gallery of Klotts's house. Witness did not see the negro go into or come out of the house, but after a short time the negro passed back over the route he had gone, passing within fifty feet of witness. Witness noticed him closely, as it was an unusual thing to see a negro in that section of the country, and he noticed the horse closely because he was an unusually free trav-

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eler. The witness's attention was more directly attracted by the negro, who on going back seemed to be trying to hide something under his coat. The witness thought that perhaps the negro had stolen his, witness's, plow lines, which he had left on a plow which he had left near Klotts's house. He went immediately to see about his plow lines, and found them safe. As soon as the witness heard of Klotts's album being gone he started out with Klotts to find the negro. They found the negro at Mr. Ford's, and arrested him. The negro on trial is the same identical negro that the witness saw ride the gray horse past his house and up to Klotts's house, and who, as stated, they arrested at Ford's. They took the negro before 'squire Goode, the justice of the peace at Mountain Home, and thence took him to Belton and lodged him in jail. Ford gave Klotts his album. Witness had never seen the negro prior to the Sunday of the burglary.

Alfred Ford, the last witness, testified, for the State, that he knew the defendant. The defendant came to Bell county in the fall of 1883 from Tom Green county, where he had been working for the witness's son. Since his arrival in Bell county the defendant has been staying on the witness's place, working at odd jobs. The defendant customarily rode a gray horse. There was no other negro on the witness's place who looked in the least like the defendant, or who owned and rode a gray horse. The "boys' room" in the witness's house, before the fire place of which the defendant generally slept, was adjoined on one side by a lumber room. Witness said nothing to the defendant when he first heard of the burglary, but proceeded to search the premises, and over the door casing in the lumber room he found the album which he afterwards turned over to Klotts. Witness did not know who put the album over the door casing. The defendant rode his gray horse off on the Sunday of the alleged robbery, and was gone the greater part of the day.

The sufficiency of the evidence and the correctness of the charge were questioned by motion for new trial.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** The indictment charges burglary with intent to commit theft, and also charges theft of property of less value than twenty dollars. By the charge of the court, the question as to the burglary was alone submitted to the jury.

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Opinion of the court.

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The verdict of the jury found the defendant "guilty as charged in the indictment." The judgment of the court considered and adjudged him guilty of "robbery." He was sentenced to imprisonment in the penitentiary for a term of two years for "theft and burglary."

It is no objection to an indictment that it charges both burglary and theft. (*Howard v. The State*, 8 Texas Ct. App., 447; Code Crim. Proc., Art. 714; *Dunham v. The State*, 9 Texas Ct. App., 330.) But can a conviction be had for both offenses when thus charged in the same indictment, and a separate punishment assessed for each, or a joint punishment assessed for both? We think not. In *Howard v. The State*, *supra*, this court said: "If both are charged in one indictment, we think it clear that the theft would be included in the burglary, and that no judgment could be rendered for the theft. And in such a case the conviction for burglary would be a bar to a subsequent prosecution for theft."

In the case before us the conviction is for *both* offenses, that is, the indictment charges *both* and the verdict finds the defendant guilty as *charged in the indictment*. It was perhaps the intention of the jury to find the defendant guilty of the burglary alone, as the punishment assessed is the *minimum* prescribed by the law for that offense, and yet the plain language of the verdict includes both offenses. This verdict was not warranted, either by the charge of the court, because the issue of the defendant's guilt of the theft charged was not submitted to the jury by the charge. Again, while the judgment does not conform to the verdict, the sentence does, and the defendant is sentenced for both burglary and theft.

We might reform the judgment if there was anything certain in the verdict by which we could do so; but we would be proceeding upon uncertainties were we to undertake it. We could not make the judgment and sentence declare the conviction to be for burglary, when the verdict and sentence declare that it was for burglary and theft together. We could not make the judgment adjudge the defendant guilty of both burglary and theft, because he cannot be legally adjudged guilty of both these offenses in this case. We must reverse the judgment and remand the cause for a new trial, in order that these errors may be corrected.

*Reversed and remanded.*

Opinion delivered June 11, 1884.

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Statement of the case.

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[No. 3185.]

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## MARION BEATEY v. THE STATE.

1. PRACTICE—CONTINUANCE is properly refused in the first instance when the application fails to allege that the applicant has no reasonable expectation of being able to secure the attendance of the absent witnesses during the term of the court by a postponement of the trial to a future day thereof.
2. SAME—NEW TRIAL—PRACTICE IN THE COURT OF APPEALS.—While the overruling of an application for a continuance is not, *per se*, the subject of revision by this court, yet the application should be taken into consideration by the court below in passing upon the defendant's motion for new trial, and will be considered by this court in revising the action of the court below in refusing a new trial. See the statement of the case for evidence set up in a motion for new trial, which, considered in the light of the evidence adduced, demanded the award of a new trial.
3. SAME—The rule stated, however, is not ordinarily applicable to a case wherein it appears that the desired testimony was supplied from other sources, and that no injury resulted to the defendant by the action of the court in refusing the continuance.

APPEAL from the District Court of Bastrop. Tried below before the Hon. L. W. Moore.

The conviction was for the robbery of S. B. Johnson, in Bastrop county, Texas, on the first day of February, 1883, and the punishment imposed was a term of two years in the penitentiary.

S. B. Johnson was the first witness sworn for the State. He testified that he lived in Williamson county, Texas. On the first day of February, 1883, the witness went to McDade, taking a load of cotton seed with him. Mr. Simmons gave the witness one hundred and seventy-five dollars with which to purchase a draft from Mr. Milton. The witness paid of this money, on Mr. Simmons's account, fifteen dollars to Mr. Benson and nine dollars for a safe. Mr. Milton was not at home, and consequently the witness gave Mr. Freeman the note which Mr. Simmons had given him with the money. While Freeman was reading the note, the witness saw the defendant standing near by. He was standing immediately behind the witness. At that time, alluding to Mr. Milton's absence, the witness told Freeman that he would have to take the money back with him. The witness then went

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Statement of the case.

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to the postoffice, and saw the defendant there. He saw, also, a gotch eared sorrel horse, hitched near the postoffice.

When the witness had traveled perhaps two or three hundred yards on his road home, he saw another man standing on the ground, fixing something, his coat the witness thought, behind his saddle. When the witness got about half a mile from the town, the defendant, riding the gotch eared sorrel horse, and another man, overtook him, and rode some distance on the road with him, engaging him in conversation. They told the witness that they wanted to buy his mules. They asked the witness where he was going, and then what road he would take to get there. The witness told them that at a certain place ahead he would take and travel the right hand fork of the road, The two men then rode on ahead of the witness. When the witness reached the forks, instead of taking the right he took the left hand fork, and after he had traveled that road some distance, he looked across the country and saw two men coming toward him from the other road. It was then growing dark, and the witness could not recognize the parties approaching as the two men he had seen, but took them to be the same.

About a quarter or half a mile further on, and in the direction of the house of Jack Beatey, a man stepped suddenly into the road from behind a tree, making the witness's mules shy to the right. Witness stopped his team and the man asked him the road to Bastrop, saying that he came from Taylor, and had been traveling all day. The witness told the man that the road he was on would take him to McDade, where he could get minute directions. Witness then started his mules, but the man halted him, saying: "Hold on; what is your name?" Witness replied: "My name is Sam Johnson." Thereupon the man pulled out a revolver and said: "I had a difficulty once with Sam Johnson, and I swore then that if I ever met him again I would kill him, and, by G--d, now I am going to do it." He then told witness to get out of the wagon. The witness started to get out on the opposite side from him, when he ordered the witness to get out on his side of the wagon. Witness did so. The man then asked him if he had any money, and the witness replied that he had a little. The man then said that money was what he wanted, and witness gave him what he had in his pocket, amounting to about two dollars and eighty-five cents. The man remarked: "I know this is not all you have got. I am going



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Statement of the case.

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to search you and the wagon, and if I find more than you have given me, I will kill you."

In view of this threat the witness then went to the wagon and got out a bag containing fifty-one dollars, which he gave the man. The man said: "That is not all." Witness then started to put his hand in his coat pocket, when the man said: "Hold on, I will attend to that." He then put his hand in witness's pocket and pulled out a silk handkerchief, which he examined and appropriated. He then pulled from the pocket of the witness an almanac, and asked the witness what it was. Witness replied: "It contains one hundred and fifteen dollars." He put the almanac in his pocket, and said: "You step out there; I will settle with you for this." Witness replied: "You have got my money now, but of course you can kill me also." The man then asked witness if he was going to report the matter when he got home. Witness replied that he could not see that he would be benefitted by telling it. The man then told the witness to drive on, but that if witness told he would kill him. Witness started to get into his wagon when the man said: "Hold on; take the lines and drive on." He walked along with the witness for perhaps one hundred yards, when he shook witness's hand, pulled witness's head down to his face and said: "Good bye. We part as friends."

All of this took place in the road, about four and a half miles from McDade, and about a quarter of a mile from Jack Beatley's house. It was about eight o'clock on a dark, moonless night. The witness recognized the man by his voice. The defendant is the man who robbed the witness in the manner, at the place, and on the occasion stated. The witness had never seen the defendant to his knowledge until he saw him that day in McDade. He did not then know defendant's name. The defendant wore no hat at the time of the robbery, but had his head covered with a handkerchief. The handkerchief did not cover his face, but came down on his face about as low as a hat would have done. When the witness reached a point about two miles from where the robbery occurred, he discovered that the envelope containing the one hundred and fifteen dollars had slipped from between the leaves of the almanac and lay intact in his pocket. The country to the left of the road at the point where the robbery occurred was timbered, and open prairie lay to the right. Mr. Simmons, Mr. Hal Hill and the witness were on the ground next day, and found where two horses had been hitched

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Statement of the case.

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about one hundred yards from the road. The witness did not see the man who robbed him after the robbery, until he saw him at the examining trial. He then recognized defendant as the guilty person, as soon as he saw him. The money taken from the witness was in one dollar silver pieces, as alleged in the indictment. All of this occurred in Bastrop county, Texas, on the first day of February, 1883.

Cross-examined, the witness reiterated his identification of the defendant as the party who robbed him, and said that he saw him for the first time that day at Milton's store, and then at the postoffice in McDade. He did not mention the fact of seeing him in McDade on the examining trial, because he was asked no question directing his attention to the fact. He was, he supposed, sworn on the examining trial to tell the whole truth about the matter, and all of it, but the question as to whether or not he saw the defendant in McDade that day was not asked him. (Witness's statement before the examining court, as appears from his written testimony, was as follows: "When I got about a half a mile from town, the defendant here in court, whom I recognized, and another man overtook me.") The witness saw Mr. Simmons on the same night after the robbery, and gave him what money he still had left. He told Simmons that the man who rode the gotch eared horse was the man who robbed him. Mr. Bishop sent for the witness to make affidavit against the defendant, sometime in January, 1884. That was after the trouble that occurred in McDade on Christmas, 1883. Milton and Bishop did not tell the witness to make the affidavit, and that they would furnish the proof to convict. Witness did not tell Oliver, in the presence of J. J. Young, at Oliver's gin, in Williamson county, about the middle of January, 1884, that "they said for me to make the affidavit and they would furnish the proof." Witness made no such statement in reply to Oliver's question: "How is it that you can make an affidavit against Beatey when you have said that you could not recognize him, and while it can be proved that Beatey was sick in bed at the time of the robbery?" The witness did not tell Young or Oliver, in Young's presence, at Oliver's gin or at Rivers & Gresham's store, in July or August, 1883, that the man who robbed him was disguised or had a handkerchief over his face, so that witness could not recognize him.

The foot tracks along the road (where defendant walked with witness) looked like they were made by a shop made boot. They

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Statement of the case.

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had small heels, and it was decided by the parties who made the examination that the tracks were made by a shop made boot. Witness could not tell the size of the boot by number. The witness emphasized his denial that he ever told Oliver at his gin in Williamson county, in the presence of Young, in January, 1884, or at Rivers & Gresham's store, or any where else, at any time, that he could not recognize the robber and did not know who he was. He did tell Oliver and others that he did not know the name of the man who robbed him; that he did not know him as Marion Beatey, but that he intended to attend the examining trial of the defendant, and that if defendant, calling himself Marion Beatey, was the man who robbed him, and he recognized him as the man, he was going to say that he was the man, and if he could not recognize him he intended to say so.

S. G. Simmons was the second witness sworn for the State. He testified that on the morning of February 1, 1883, he gave Mr. Sam B. Johnson one hundred and ninety dollars to take to McDade for him. Johnson was to pay to one party the sum of nine dollars, to another the sum of fifteen dollars, and with the balance purchase a draft of Mr. Milton for the witness. Johnson brought back only one hundred and fifteen dollars. Counting over his money, witness found that he was short fifty-one dollars. When Johnson got back that night he told the witness that he had been robbed, and he thought he was robbed by a man he saw in McDade, riding a gotch eared sorrel horse. On the next morning the witness went with Johnson to the place where he said the robbery took place. It was about three and a half miles from McDade, and about two hundred yards from Jack Beatey's house. They found where two horses had been hitched, and had eaten the leaves and twigs from the bushes. The track of but one horse led from that point across the road toward Jack Beatey's. The leaves on the ground were so dry that the tracks of the horses leading to the place where they had been tied could not be found. The tracks of but one man were found behind the tree. The tracks of two men led along the side of and up the road for about one hundred yards. One of these tracks resembled Johnson's very much, while the other was a medium sized track with a small heel, in size about a number eight or nine. Johnson said at the time that he did not know the man who robbed him, but described the gotch eared sorrel horse.

Thomas Lemaster was the next witness for the State. He testified that he first heard of the robbery on the day after it oc-

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Statement of the case.

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curred. On the day of the robbery the witness and Tom Bishop took dinner at the house of the defendant's father, and saw the defendant there at the time. The parties were gathering cotton at the time. Defendant helped drive up cattle after dinner, and then left, saying that he was going to McDade for some medicine. He left, going in the direction of McDade, which was about three miles distant. Defendant was then riding a gotch eared sorrel horse. This was on or about the first day of February, 1883. Witness heard of the robbery next day. When defendant left, going to McDade, he said that his brother Az was sick, and that he was going after medicine for him. At this point the State closed.

J. J. Young was the first witness for the defense. He testified that he was present at Oliver's gin, in Williamson county, shortly after the affidavit upon which this prosecution is predicated was filed by the State's witness Johnson, when the witness, Johnson and Oliver had a conversation regarding this alleged offense. The parties named were at the time working at the pump. Oliver asked Johnson if he had made an affidavit against the defendant. Johnson replied that he had. Oliver then asked him how it was that he could make an affidavit against any one when he had always said that he could not tell who robbed him. Johnson replied that all he had to do was to make the affidavit, and that "they" would make the proof. Witness could not be positive that Johnson said that "they" meant Bishop and Milton, but witness so understood him. On several occasions, at Oliver's store and at Rivers & Gresham's store, during the summer, and in the months of July and August, 1883, the witness had heard Johnson say that he did not know who robbed him; that the man who robbed him had a handkerchief or something white on his face, and that he could not tell him where he to see him again; that it was dark at the time, and that he had no idea who the robber was.

Cross-examined, the witness said that he did not pay very strict attention to what was said by the parties at the several times, and could not swear positively to the language used. Johnson addressed Oliver on the occasions spoken of. Witness would not swear positively to anything Johnson said about the robbery.

H. H. Hasley was the next witness sworn for the defense. He testified that he had never known the defendant to own a one eared or a gotch eared horse. Az Beatey owned such a horse at

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Statement of the case.

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the time of the alleged robbery, but it was then in the possession of Thad. McLemore. McLemore was engaged in the butcher business in McDade, and had the gotch eared horse in use at the time. The defendant had never worn shop made boots. He customarily wore Batchelor's brogan boots, and rarely ever wore shoes.

Cross-examined, the witness stated that the defendant was his son-in-law. Thad. McLemore used the gotch eared horse because he had lost his own horse by drowning. He got the gotch eared horse in the fall of 1882. A brother of Thad. McLemore was married to one of defendant's sisters. All of the Beatey boys frequently rode the gotch eared horse.

R. J. Stevens testified, for the defense, that Az Beatey owned a one eared, or gotch eared, sorrel horse, which Thad. McLemore got in September, 1882, and kept until the following spring. That horse had fallen over a bluff and broken his neck since Az Beatey got him back, and was now dead. Az got him back from McLemore in April, 1883.

William Cruse testified, for the defense, that he knew Thad. McLemore, and lived near him during the winter of 1882-3. Thad. used during that time a one eared, or gotch eared, sorrel horse called "Punkins," that belonged to Az Beatey. Thad. worked this horse between McDade, where he had a meat market, and his slaughter pen. Witness did not know that he had ever seen Thad. riding old "Punkins." Defendant lived near old man Beatey's.

Alice Beatey, the wife of the defendant, testified, in his behalf, that she was living at old man Beatey's on the first day of February, 1883. The defendant, at that time, had been sick for four or five weeks. Witness heard of the alleged robbery on the day after it was said to have occurred. The defendant was confined to his room the whole of the day on which Johnson was said to have been robbed; he did not leave home that day. Some time after the alleged robbery Bishop and Lemaster came to the house, and the defendant went off with them. He went to McDade for medicine, and was sick and under medical treatment at the time. Jack Beatey told witness of the reported robbery the day after it is said to have been committed. Az Beatey was sick from January 21, 1883, until some time in March. Witness was present at the examining trial, but was not called as a witness, and therefore did not testify.

Blanche Beatey testified, for the defense, that she was the wife

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Statement of the case.

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of Jack Beatey. Johnson was said to have been robbed on or about February 1, 1883. Witness's children were sick at the time, and witness and Jack had been trying to get some money from Bob McLemore, who was then living with them. On the evening of the alleged robbery of Johnson, Thad. McLemore came by witness's house to bring some blueing he had purchased for them in McDade. The witness thinks he, Thad., was then riding old "Punkins." He asked for Bob McLemore, and he and Bob went to the lot together and had a conversation, which witness did not hear. Bob came back to the house, got an old pistol from the shelf and left, and returned in about an hour, and he and his wife went into the dining room, where witness heard them counting money. Witness looked through the door and saw them, Bob McLemore and his wife, counting silver. Thereupon witness went and told her husband that some one had been robbed, and that he would hear of a robbery next day. Witness's husband, who had been sitting up with Az Beatey, had gone to bed. The next morning the witness and her husband examined Bob McLemore's coat, and found twenty silver dollars in the pocket. Soon after that they saw some men down on the branch looking around, and witness remarked to Bob: "There are some men looking for you now." Bob replied: "If any body says anything to you, you tell them that I was here all of last night." He then took the money and hid it. On the seventh day of that month witness and her husband went to old man Beatey's, and her husband said that he was going to Mr. Simmons's. Witness was at old man Beatey's house when Bishop and Lemaster came there. That was seven or eight days after the robbery. The defendant on that day went off with Bishop and Lemaster. Thad. McLemore came to witness's house on the night of the robbery, riding a horse that belonged to Az Beatey. He left, riding that horse, and Bob followed shortly on foot.

Cross-examined, the witness said that the defendant and Az Beatey were living at old man Beatey's at the time of the robbery. Jack Beatey, witness's husband, lived about two and a half miles distant, with Bob McLemore. Jack said that he was going to tell Mr. Simmons who perpetrated the robbery, because it occurred so near his house that suspicion might attach to him.

S. G. Simmons was then placed upon the stand by the defense. He testified that four or five days after the robbery he heard that Jack Beatey had told Johnson who it was that robbed him,

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Statement of the case.

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Johnson, and in consequence, he, witness, went to old man Beatey's to see Jack. Jack told him that Bob McLemore robbed Johnson. Witness asked Tom Bishop to help him apprehend the party who robbed Johnson. Bishop replied that he did not live in the county and would have nothing to with it. When witness heard that Bob McLemore committed the robbery, he spoke of having him arrested, but Jack Beatey advised him not to, saying it would do no good, as Bob would prove out of it.

Eliza Beatey, the mother of the defendant, testified in his behalf that the defendant was at home, sick, on the night of the robbery. On the next night Jack Beatey told the witness who perpetrated the robbery. Witness remembered when Bishop and Lemaster came to the house. It was at least six days after the robbery.

Cross-examined, the witness said that the defendant had been sick for some time before the robbery, and was then under medical treatment. Sometimes he would be confined to his bed, and at other times he would not. Az was taken sick with erysipelas in his arm on January 21, 1883. Witness did not think the defendant went off with Bishop and Lemaster the day they were there, but he may have done so. If he did, he did not go for medicine for Az. Defendant may have been out of the house some days without the witness knowing it.

Tom Bishop was introduced by the State in rebuttal. He testified that he lived in Williamson county. He heard of the robbery the day after it occurred. Witness saw the defendant at old man Beatey's on the day of the robbery. Witness and Thomas Lemaster took dinner there that day about noon. Defendant, riding a gotch eared sorrel horse, rode a short distance with witness after dinner, and left them, saying he was going to McDade to get medicine.

Cross-examined, the witness said that he was not instrumental in securing the arrest of the defendant, but he sent word to Johnson to come to McDade and help him sift all of the robberies that had occurred in that section, and run all robbers out of the county. This was after the witness's trouble with the Beatey boys at McDade, on December 25, 1883. Witness saw Mr. Summers with a party of men soon after the robbery. Summers asked him to help him apprehend the robber. Witness declined, saying that he did not live in the county, and did not like to be mixed up with the matter.

The application for continuance referred to in the head notes

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Opinion of the court.

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and opinion was based upon the absence of the witnesses W. C. Oliver and Nancy Elder. After setting forth the diligence used to secure their attendance, the application averred that the defendant expected to prove by the said Oliver that, on or about the fifteenth day of February, and on divers days thereafter, at Oliver's gin and Rivers & Gresham's store, in Williamson county, Texas, Johnson, the prosecuting witness, told him, Oliver, that he did not know the robber, and had no idea who he was; that, after Johnson filed the affidavit charging the applicant with the robbery, he, Oliver, asked him, Johnson, how he could make the affidavit, not knowing who the robber was, and that Johnson replied that Milton and Bishop told him if he would make the affidavit they would furnish the proof.

The application alleged that, by the witness Nancy Elder, the appellant could prove that he was sick at his father's house at the time of the robbery, and had been sick and confined to his bed for several days before, and continued to be so confined for several days after the alleged robbery.

The motion for new trial presented the questions discussed in the opinion.

*Jones, Johns & Scott*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. The only real question presented by the record on this appeal hinges on the correctness of the final action of the court upon defendant's application for a continuance. When first presented it was unquestionably properly overruled by the court, because it failed in one of the statutory requirements, in that it did not allege that there was no reasonable expectation of securing the attendance of the absent witnesses during the term of the court by a postponement of the trial to a future day thereof. (Code Crim. Proc., Art. 560, sub-div. 6; *Strickland v. The State*, 13 Texas Ct. App., 364.) But, as was said in *Strickland's case*, "while the overruling the application would not in the first instance be the subject of revision by this court, yet it should be taken into consideration by the court below in passing upon defendant's motion for new trial, and will be considered by this court in revising the action of the court in refusing a new trial." (P. 371; see also *Stanley v. The State*, decided at the present term, *ante*, p. 392.)



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Syllabus.

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It is urged, however, as an additional reason for sustaining the court on the motion for new trial, that the refusal of the continuance asked was not error because it appears that the testimony of the absent witnesses was fully supplied from other sources, and that no injury resulted to the defendant. This proposition, if warranted by the facts, is supported by authority. (*Parkerson v. The State*, 9 Texas Ct. App. 72; *Allison v. The State*, 14 Texas Ct. App., 402; *Wooldridge v. The State*, 13 Texas Ct. App., 443.) In this case, however, the evidence adduced does not supply that sought from the absent witnesses in more than one material respect.

Under the peculiar circumstances of this case as made by the evidence, we are of opinion that the court erred in not granting a new trial, when the proposed evidence stated in the application for continuance is considered in connection with that elicited on the trial. That it was material is evident; that it was not probably true is not made sufficiently manifest by the testimony adduced.

The judgment is reversed and the cause remanded for a new trial.

*Reversed and remanded.*

Opinion delivered June 11, 1884.

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[No. 3155.]

HENRY WEISS v. THE STATE.

**PLAYING CARDS IN A PUBLIC PLACE—INDICTMENT.**—Article 355 of the Penal Code enumerates the public houses in which it is made penal to play at a game of cards. Article 356 prescribes the circumstances under which a room in a house may come within the prohibition of the laws, to-wit: "Any room attached to such public house and commonly used for gaming. A private room of an inn or tavern is not within the meaning of public places, unless such room is commonly used for gaming," etc. It follows that when a room of a house is designated as the place of playing, the indictment, to charge the offense of playing cards in a public place, must allege that the room is attached to some one of the public houses named in the statute.

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Opinion of the court.

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APPEAL from the County Court of Robertson. Tried below before the Hon. J. E. Crawford, County Judge.

The opinion discloses the case. The penalty imposed was a fine of ten dollars.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. In this case the indictment charges that appellant did "unlawfully and willfully play at a certain game with cards at and in a certain gaming room used for gaming," etc. Is this allegation sufficient?

After enumerating, in Article 355, the public houses in which it is made penal to play at any game with cards, our statute, Article 356, Penal Code, prescribes the circumstances in which a room in a house may come within the prohibition of the law, to wit: "Any room attached to such public house and commonly used for gaming. \* \* \* A private room of an inn or tavern is not within the meaning of public places, unless such room is commonly used for gaming," etc. To play in an out house where people resort is also an offense. (Art. 355.)

Where a room of a house is designated as the place, we are of opinion that the allegations must further declare that such room is attached to some one of the public houses named in the statute. (*O'Brien v. The State*, 10 Texas Ct. App., 544.) If the charge had been that the playing was in "a gaming house," instead of "room," that would have been sufficient under Article 356. "House" and "room" are not used as synonymous or convertible terms.

Because the court erred in overruling the motion to quash the indictment, the judgment is reversed, and because the indictment is insufficient to charge an offense, the prosecution is dismissed.

*Reversed and dismissed.*

Opinion delivered June 11, 1884.

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Statement of the case.

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[No. 3145.]

## BRITTON TURNER v. THE STATE.

**MURDER—EVIDENCE—FACT CASE.**—See the statement of the case for evidence held insufficient to support a conviction for murder in the second degree.

**APPEAL** from the District Court of Houston. Tried below before the Hon. J. R. Kennard.

The offense charged in this case, the murder of G. W. Montzingo, is the same charged in the two preceding cases, *Turner v. The State*, ante, page 378, and *Stanley v. The State*, ante, page 392. The appellant was convicted of murder in the second degree, and his punishment was affixed at a term of twenty years in the penitentiary.

The witnesses, Bob Stevens, Mrs. Montzingo, Henry Montzingo and John Glover for the State, and J. B. Jones, James Shaw, Rowan and Woodson for the defense, repeated, in substance, the testimony they gave on the previous trials of John Turner and Thomas L. Stanley, above referred to.

Fletcher Thomas testified, for the State, that he saw the defendant with John Turner, Tom Stanley and the deceased on the gallery of John Robinson's saloon, in the town of Lovelady, on the day of the killing. Defendant was doing nothing at that time. Witness heard John Turner say to the deceased that he, deceased, ought to take an ax handle and wear Stanley out with it. The defendant said nothing, but was standing on the gallery of the saloon, some feet off, but near enough to have heard John Turner's remark to deceased. While witness did not know that the defendant heard the remark, he supposed that he did. Deceased, John Turner, Tom Stanley, Arthur McManners and witness were present at the time of the remark, and the defendant, as stated, was standing near by. Tom Stanley lived with the Turner boys at old man Turner's house.

J. M. Earnest testified, for the State, that he saw John Turner and Tom Stanley near Robinson's saloon, in Lovelady, late on the evening of the killing. He was not certain that he saw the defendant there at that time. Fletcher Thomas was then stand-

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Statement of the case.

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ing at Hemphill's saloon, fifteen feet distant from Robinson's saloon.

John Robinson testified, for the State, that he saw the defendant and Tom Stanley in Lovelady on the day of the killing. Witness also heard a conversation between John Turner, Tom Stanley and deceased, at which the defendant was present, standing on the gallery of witness's saloon. Fletcher Thomas and Earnest were also present. The deceased came into witness's saloon, took a drink of whisky, and bought a bottle of the same liquor, which he took home, he said, for the purpose of making camphor. Witness did not remember that the defendant drank.

L. P. Hemphill testified that he was at the house of the deceased on the night of and just after he was killed, and on that night he made an examination for blood. He found blood strewn from the house to the gate. He saw some blood on the left hand gate post going in. He found no blood outside the gate, and had no recollection of seeing a plow or plow beam about the premises. This examination was made at night. Witness made no examination next day.

Doctor Burroughs testified, for the State, that he examined the body of the deceased on the morning after the killing. One rib was severed, but the witness did not know that two were. The wound under the shoulder blade could hardly have been inflicted with a knife. It could have been inflicted with an ax.

John I. Moore testified, for the defense, that he presided over the inquest on the body of the deceased as justice of the peace and *ex officio* coroner. The wound under the shoulder blade was not a straight wound, but was more in the shape of a crescent or half moon. The wound on the back was a mere scratch.

The testimony of Buck Shaw, for defense, was substantially the same as that he gave on the trial of John Turner.

Doctor Burroughs, recalled for the State, testified that while the wound under the deceased's shoulder blade was not exactly straight, it was not in the shape of a half moon or crescent.

Errors in the charge of the court, and the insufficiency of the evidence to support the conviction, were the grounds assigned for new trial.

*Cooper & Cooper*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

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Syllabus.

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WHITE, PRESIDING JUDGE. The appellant was convicted of murder in the second degree for the killing of one G. W. Montzingo. We have already, at the present term, passed upon the cases of Stanley and John Turner, who were also separately indicted for the same murder. Errors pointed out and held fatal in the charge of the court in those cases appear to have been corrected in the charge given in this case, and the charge in this instance is not obnoxious to serious objection.

But when the evidence in this case is maturely considered with reference to the part this appellant took in the killing of Montzingo, we do not hesitate to say that, as shown by this record, it fails to satisfy us with that reasonable degree of certainty essential to all convictions in criminal cases, that his guilt of murder in the second degree is so established as that we would be willing to let such a conviction stand as a precedent for that crime.

If the evidence shows the defendant's guilt of any crime at all, it does not show satisfactorily, even when the acts of Stanley as exhibited in this record are imputed to him as a principal, that the killing was murder in the second degree.

Because the evidence is insufficient to support the verdict and judgment, the judgment is reversed and the cause remanded.

*Reversed and remanded,*

Opinion delivered June 4, 1884.

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[No. 3209.]

## AMERICUS MADISON v. THE STATE.

1. THEFT.—A fraudulent taking is a necessary and an indispensable element of theft. In order to constitute that offense under our law it is not necessary that the property be removed any distance from the place of taking; it is sufficient if it has been in the possession of the thief, though it may not be moved out of the presence of the person deprived of it, nor is it necessary that any definite length of time shall elapse between the taking and the discovery thereof; if but a moment elapse, the offense is complete.
2. SAME—FRAUDULENT TAKING—POSSESSION—CHARGE OF THE COURT.—The facts in this case showed that the defendant, who claimed to own hogs running in the same range where the hogs in question were found,

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Statement of the case.

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said that he supposed they belonged to him, called them up, and sold them to a third party, who, a day or two afterwards, took possession. The court, in substance, charged that the mere sale of the hogs was equivalent to a taking. *Held*, error; that in order to amount to theft, the seller of the stolen property must have had some manner of possession of the property. The rule is invariable that there must be an actual taking or a conversion of the stolen property in order to support a conviction for theft. See the opinion *in extenso* on the question.

3. SAME—APPROPRIATION.—Consistent with the doctrine stated is the rule that, "if the thief fraudulently procure a person innocent of any felonious intent to take the goods for him, his offense will be the same as if he had taken the goods himself." See the opinion and statement of the case for evidence *held* sufficient under this rule to show a taking and appropriation by the defendant.
4. SAME—INTENT—FACT CASE.—But see the statement of the case for evidence *held* insufficient to disclose a fraudulent intent, and therefore insufficient to support the conviction.

APPEAL from the District Court of Walker. Tried below before the Hon. J. R. Kennard.

The conviction was for the theft of twenty hogs, the property of R. H. Cabiness, of the aggregate value of forty dollars, in Walker county, on the tenth day of March, 1883. A term of two years in the penitentiary was the punishment awarded.

R. H. Cabiness was the first witness for the State. He testified that, early in March, 1883, he left his home to look after his stock. The creek running near his house was so swollen that he left his horse and crossed over on a foot log, and went into the field in which the residence of Mr. Grooms was situated. He found Mr. Grooms penning some hogs in a close pen that he had recently made. Witness asked Grooms about the hogs that he was then penning, and ascertained from him that he had purchased them from the defendant. Witness informed Grooms that those hogs were his. The bunch included seventeen shoats and three sows. Grooms had butchered one of the sows, and was on the eve of marking the shoats, which at that time were unmarked. The animals described were perfectly gentle, and would readily answer to call. Witness had the defendant sent for, and he came to Grooms's place. Witness asked the defendant why he had traded his hogs to Grooms. The defendant replied that they looked like his hogs—a bunch that he had purchased from Mr. Roberts, and that he took them to be that same bunch. Some one asked the defendant what he proposed to do about the hog Grooms had killed—if he was going to pay for it.

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Statement of the case.

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He answered that that was Mr. Grooms's business, or that Grooms would attend to that, as it was Grooms that killed the animal. The witness remarked, in reply, that he did not want pay for the hog, as he intended to prosecute the defendant for taking the animals.

Cross-examined, the witness stated that his mark was a swallowfork in one ear and a split in the other. He found his hogs as stated, and sent for the defendant on or about the tenth day of March, 1883. He took his hogs home on the same day, and on that same evening went to Huntsville and lodged complaint against the defendant, charging him with the theft of the hogs, twenty in number. He made this complaint before a justice of the peace. The complaint, bearing date March 10, 1883, was here exhibited. On the Monday following the Saturday on which the hogs were recovered and the complaint filed, the defendant came to the witness's house, having a hog in his wagon which he offered the witness in the place of the one Grooms had killed. The witness hesitated about accepting the hog, but finally told the defendant that he would accept the hog in payment for the one killed by Grooms. He directed the defendant to put the hog in his, witness's, lot, which he did. Witness thereupon turned the hog over to a colored man. He did not, on that occasion, tell the defendant that he had been to Huntsville and filed a complaint against him for stealing the hogs. The defendant did not, at the time that he made restitution for the hog killed by Grooms, know that the complaint for theft had been filed. Witness was of the impression that the defendant knew his, witness's, mark, as two years before, he, the defendant, had attended to and milked some of witness's cows in that mark. When the defendant milked the cows spoken of he lived about nine miles from the place where he lived when he sold the hogs to Grooms. Witness owned three sows in the lot the defendant sold to Grooms, one a black sow, one a brown or sandy sow with spots about on her body, and the other a spotted sow. Grooms's place was about two and a half miles distant from witness's residence. The witness identified the defendant, and stated that the hogs were owned by him, witness, and were taken without his consent, in Walker county, Texas, on or about March 10, 1883.

The witness Grooms testified, for the State, that he traded for a bunch of hogs with the defendant; that at the time he made the trade the hogs were running in his, witness's, field; that he

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Statement of the case.

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informed the defendant that the hogs were in the field, and the defendant said that he thought they were his, the defendant's, hogs, as he had hogs running in the same range with the Cabiness hogs. Witness made the trade with the defendant for the hogs on Thursday. On Saturday following, while he, witness, was putting the hogs in a small pen for the purpose of marking the shoats, Cabiness came up and claimed the hogs as his. The defendant was then sent for, and came to the hog pen. Cabiness told the defendant that the hogs belonged to him, Cabiness. Defendant replied that the hogs looked like his, and he thought that they were his when he traded them to the witness. The hogs, except one open sow, which the witness had killed, were taken away by Cabiness.

Cross-examined, the witness stated that the defendant owned a bunch of hogs that ran on the same range with the Cabiness hogs. About eight days after the hogs traded for were identified as Cabiness's hogs, the defendant found his hogs, and turned them over to the witness for the same consideration that had been paid on the trade for the Cabiness hogs. The defendant had a fine lot of hogs, numbering about thirty head of shoats, and four or five sows. Of the Cabiness hogs described, the witness bought of defendant eleven shoats and three sows. One of the sows was black in color, another was a sandy animal with some white spots about the body, and the other was spotted. The sows witness last bought of the defendant were marked with a crop and split in one ear, and a crop and upper half-crop and underbit in the other. The defendant had a very poor faculty for distinguishing ear marks, and could not now, if required to do so, go out into the court house yard, examine the mark of a hog and return and describe it correctly. Before he traded for the hogs that proved to belong to Cabiness, the witness knew that the defendant owned hogs running on the same range with the Cabiness hogs, not far from where he, witness, lived. He knew that the defendant had not seen his hogs oftener than twice since Christmas, 1882. There were two different ear marks in the second lot of hogs that the witness got from the defendant, one of which was the defendant's mark and the other the Roberts mark. Neither of these marks resembled the Cabiness mark. When the witness bought the Cabiness hogs from the defendant, he and the defendant called the hogs right up to them. They were quite gentle. Witness went to defendant's house after Cabiness claimed the hogs, when, it is the impr'es-



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Statement of the case.

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sion of the witness, the defendant, upon being asked about the mark, said: "That it is the old Cabiness mark." The Cabiness and Roberts mark, except that both had a split in one ear, were totally unlike. The State closed.

Jimmie Smith was the first witness for the defense. He testified that he was present at the Grooms house on the Saturday that Cabiness sent for the defendant to go to Grooms's house. When Cabiness told the defendant that the hogs he had sold to Grooms were his, Cabiness's, hogs, the defendant said that they looked like his own hogs, and that at the time he traded them to Grooms he thought that they were his. The witness knew that the defendant owned hogs running in the same range with the Cabiness hogs when he made the trade with Grooms. He owned a "likely" or good bunch, numbering four or five sows and some thirty pigs, or shoats. The witness owned these hogs originally, but sold them to Roberts, who subsequently sold them to the defendant. Witness heard of this latter sale through both Roberts and the defendant. These hogs had been somewhat dogged, and were therefore inclined to be skittish. The Cabiness hogs were gentle. Witness knew that the defendant had a very poor faculty for distinguishing the ear marks of animals. It is possible that the defendant might be able to distinguish his own hog mark from that of another person, but the witness doubted such fact.

J. W. Robinett testified, for the defense, that he knew that the defendant owned hogs running in the same range with the Cabiness hogs. They were a fine lot, numbering some five or six sows, and some twenty or thirty pigs or shoats. Witness had made an ineffectual effort to trade with the defendant for his bunch of hogs. Witness knew the defendant well. His, defendant's, faculty for distinguishing ear marks of animals was exceedingly poor. He had no ability to identify ear marks at all. Among the hogs owned by the defendant there was a black, a black and white spotted, and a sandy colored sow. This latter had some spots on her body. There was some resemblance between these three and some sows owned by Cabiness.

The proof in this case further showed that the complaint was made before a justice of the peace on March 10, 1883, and that the defendant had no notice of such complaint until he was arrested on the thirteenth day of the following April.

That the verdict was against the evidence, that the court erred in its general charge, and in the refusal to give certain re-

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Opinion of the court.

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quested charges, were the grounds urged in the motion for new trial.

*J. M. Maxcy*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. The appellant was convicted of the theft of certain hogs, the property of one Cabiness. Without discussing the many errors assigned, we propose to discuss but two questions, to wit: 1. As to the sufficiency of the facts to establish theft as defined in our Code; and 2, the sufficiency of the evidence to establish the guilt of the defendant.

A fraudulent "*taking*" is the essential element of theft as that offense is defined in our Code. (Penal Code, Art. 724.) At common law, a carrying away or asportation was necessary in connection with a fraudulent taking, but under our Code, "to constitute theft, it is not necessary that the property be removed any distance from the place of taking; it is sufficient that it has been in the possession of the thief, though it may not be moved out of the presence of the person deprived of it; nor is it necessary that any definite length of time shall elapse between the taking and the discovery thereof; if but a moment elapse, the offense is complete." (Penal Code, Art. 726.)

What is a taking under our law? Must actual, manual possession, or the exercise of actual custody and control, be established to constitute a taking? These questions are suggested, and necessary to be determined from the facts in this case. It is shown by the evidence beyond controversy that the appellant sold the hogs to Grooms, and that the hogs belonged to Cabiness. The hogs were running in Grooms's field, who, believing them to belong to defendant, informed the latter that they were in his field. "Defendant said he thought they were his hogs; that he had hogs running in the same range." Witness (Grooms) and defendant called the hogs right at (up to?) them." Defendant sold the hogs to Grooms, and Grooms, the next day, put them into his pen, where they were afterwards found, and claimed by Cabiness.

Was this such a "taking" by defendant as constitutes theft under our statute? At common law there was required to be not only a taking, but asportation also. And Mr. Russell says: "There must be an actual taking or severance of the goods from

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Opinion of the court.

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the possession of the owner, on the ground that larceny includes a trespass. If, therefore, there was no trespass in taking goods, there can be no felony in carrying them away. But the taking need not be by the very hand of the party accused; so that if the thief fraudulently procure a person innocent of any felonious intent to take the goods for him (as if he should procure an infant within the age of discretion to steal the goods), his offense will be the same as if he had taken the goods himself, and it should be so charged. It appears to be well settled that the felony lies in the very first act of removing the property; and therefore that the least removing of the thing taken from the place where it was before, with an intent to steal it, is sufficient asportation, though it be not quite carried away." (2 Russ. on Crimes, 9 ed., p. 152.)

In the case before us, the hogs were in their accustomed range, and Grooms, after his purchase, did not drive or pen them for a day or so. Did the single act of defendant in selling him the hogs, under the circumstances, amount to theft? At the request of the district attorney, the court charged the jury "that the selling of property belonging to another by one who knows the same is not his own is sufficient in law to constitute a taking as meant in the definition of theft; and if all the other ingredients of theft, as given you in the general charge, are proven, and a taking is shown by a sale of the property, then such sale is a taking under the law."

This charge simply affirms that a sale is equivalent to a taking.

In *Hardeman v. The State*, 12 Texas Court of Appeals, 207, Hardeman sold a steer running on the range, the property of one May, to one Wear, and this court said: "The evidence fails to show that the steer was ever in possession of the defendant. To constitute theft, there must be a *fraudulent taking* by some person. In this case, the defendant did not take the animal, nor did Calvin Wear, to whom defendant sold the animal; and, if Wear had taken the property, his taking would not have been fraudulent, but honest, he having bought and paid for it, and received the bill of sale for the steer. This steer, running on the range all the time, was not taken fraudulently or otherwise by any person, hence there was no theft." This decision fully refutes the proposition announced in the charge given—that a sale alone constitutes a taking. Under the *Hardeman* decision, it would appear that a defendant must have some sort of possession of the stolen property, else a sale of such property by

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Opinion of the court.

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him would not amount to theft; and we are of opinion that this proposition is well sustained by authority and reason. There must be an actual taking or conversion of the stolen property to support a verdict of guilty of theft. In *White v. The State*, 11 Texas, 771, the Supreme Court say that intention and conversion were both "necessary elements to make out a charge of theft. In all criminal cases nothing is presumed against the accused. The proof must show that there was a conversion, which under the Code is the synonym of taking." (*Martin v. The State*, 44 Texas, 172.) In Martin's case the proof was that the owner of the alleged stolen hog, while in his field, heard the report of a gun; advancing he saw, just over a hill, the defendant loading his gun, and on approaching the defendant he saw, about fifteen feet from where defendant was standing, one of his hogs freshly shot. He said to defendant: "That is my hog." Defendant replied: "I did not shoot it." It was held that actual conversion or possession was not shown, and that the intent and act constituting the offense must both exist to make out the offense.

In *State v. Wilkerson*, 72 North Carolina, 376: "When A was indicted for stealing a hog, and on the trial it was shown that a hog belonging to the prosecutor had been killed and concealed in the corner of the fence, covered with leaves, and that A was seen at night to go to the place, and look carefully around and stoop over, as if to take the hog, and upon being hailed fled, *held*, that these facts alone would not justify a verdict of guilty."

The case we are considering is not, it will be noticed, precisely similar to any of the other cases we have cited. In this case, though the hogs were in their accustomed range, yet they were gentle and were called up by defendant or Grooms, and were right up at them, in their presence, and could have been immediately driven off by either or both when defendant made his sale and constructive delivery of them to Grooms. Under these circumstances, had not the hogs been "taken," in legal contemplation, by defendant before the sale? He called them up; this was exercising control over them certainly, and, after they came up, and whilst they were thus in his control, if he, knowing them not to be his property, sold and constructively delivered them to Grooms, who afterwards took them into actual possession, under the purchase, it would, in our opinion, bring the case fully within the rule quoted above from Russell, viz: that "if the thief fraudulently procure a person innocent of any felonious intent to take the goods for him, his offense will be the same as

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Opinion of the court.

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if he had taken the goods himself." The appropriation, so far as defendant is concerned, was obvious, and the taking did not rest solely upon the subsequent exercise of ownership and possession by Grooms.

But, as stated above, the charge given at the request of the district attorney was erroneous.

In addition to this error, we are not satisfied that such fraudulent intent is established by the evidence as warrants the conviction.

Appellant had hogs, which he had bought of Roberts, running in the same range. Grooms believed these to be defendant's hogs. Defendant said that he also believed them to be his. The marks, it is true, were somewhat different, but defendant is shown to be little acquainted with the difference in marks. There was no concealment or attempt at concealment with regard to any part of the transaction by defendant. His actions are not inconsistent with honest and fair dealing, under an honest but mistaken claim of right to the hogs. He certainly promptly and fully righted the wrong, if any had been done, as far as could be by satisfying Cabiness and Grooms in so far as they were likely to be injured by a loss of the hogs alleged to have been stolen.

In our opinion the evidence does not support the verdict and judgment, and in connection with our conclusions upon this point we cite the following cases: *Mullins v. The State*, 37 Texas, 337; *McHenry v. The State*, 40 Texas, 46; *Clark v. The State*, 7 Texas Court of Appeals, 57; *Landin v. The State*, 10 Texas Court of Appeals, 63; *Shelton v. The State*, 12 Texas Court of Appeals, 513; *Taylor v. The State*, Id., 489; *Mapes v. The State*, 14 Texas Court of Appeals, 129; *Dresch v. The State*, Id., 175.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 14, 1884.

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Statement of the case.

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[No. 2984.]

## LIZZIE HANDLEY v. THE STATE.

1. **DISORDERLY HOUSE—JURISDICTION OF THE MAYOR'S COURT OF THE CITY OF DALLAS.**—Under the charter of the city of Dallas, the mayor's court of that city has concurrent jurisdiction with the county court over the offense of keeping a disorderly house.
2. **SAME—FORMER ACQUITTAL—CASE STATED.**—The indictment in this case, charging the appellant with keeping a disorderly house on May 15, 1883, was filed May 23, 1883, and the trial was had on September 4, following. The defense interposed a plea of former acquittal before the mayor's court. The evidence showed that on the thirteenth day of June, 1883, upon a complaint charging her with keeping a disorderly house in Dallas, the defendant was acquitted on a trial before the mayor's court; that the testimony adduced on that trial was the same as that adduced on this trial; that it covered and embraced the whole period of time for and including the fourth day of April, 1883 (when she was convicted in the county court for keeping a disorderly house in Dallas), up to May 23, 1883, and that every act done by her in keeping the disorderly house during said period of time was proved on the trial in the mayor's court, and by the same witnesses who testified on this trial. *Held*, that whether or not the keeping of a house for public prostitution and as a common resort for prostitutes and vagabonds is an offense continuous in its nature, the plea of former acquittal, under the facts proved, should have prevailed.
3. **SAME—CONTINUOUS OFFENSE.**—Whether or not the keeping of a disorderly house is an offense continuous in its nature was not considered by the trial court as an issue in this case, but he treated the plea of former acquittal as unsupported by the evidence, because the penalty prescribed by the city ordinance was not as great as that prescribed by the statute; for which reason he instructed the jury, in substance, to disregard the plea. The record discloses no such ordinance, and the trial judge must have assumed its existence or held that it devolved upon the defense to prove it; in which there was error.
4. **SAME.**—The Legislature having conferred upon the mayor's court of the city of Dallas jurisdiction over the offense of keeping disorderly houses, concurrent with the county court, the presumption obtains, until the contrary is shown, that the city ordinances have conformed the penalty to that of the State.

APPEAL from the County Court of Dallas. Tried below before the Hon. R. E. Burke, County Judge.

The indictment charged that the appellant, in the city of Dallas, on the fifteenth day of May, 1883, did keep a disorderly

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Statement of the case.

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house for the purpose of public prostitution and as a common resort for prostitutes and vagabonds. Trial resulted in conviction, and the punishment of the appellant was fixed at a fine of one hundred dollars.

An agreed statement of facts recites as follows:

"THE STATE OF TEXAS }  
                                  v.        } In County Court of Dallas County.  
"LIZZIE HANDLEY. }

"Be it remembered, that on the trial of this action it was proved that the defendant, Lizzie Handley, was the keeper of a disorderly house, said house being kept by her for the purpose of public prostitution and as a common resort for prostitutes and vagabonds; that the said house was kept by her in the city of Dallas, county of Dallas, and State of Texas, and that she had been so the keeper of said house from the fourth day of April, 1883, up to the twenty-fifth day of May, 1883, and that the defendant was arrested on affidavit filed in the mayor's court of the city of Dallas on the — day of June, 1883, charging her with the offense of keeping a disorderly house, the same being kept by said defendant, Lizzie Handley, for the purpose of public prostitution, and as a common resort for prostitutes and vagabonds, and kept by her in the city of Dallas, and county of Dallas, and State of Texas; and that thereafter, on the thirteenth day of June, 1883, she was placed upon trial on said charge in the said mayor's court of the city of Dallas, and upon her, the said defendant's, plea of not guilty, the jury regularly impaneled to try the defendant on said charge, returned into court their verdict, as follows: 'We, the jury, find the defendant not guilty.' That the evidence offered in the mayor's court was the same as that introduced upon the trial of this cause, and covered and embraced the whole period of time from and including the fourth day of April, 1883, up to the twenty-fifth day of May, 1883, and that every act done by her in the keeping of said disorderly house during said period of time was proved on the trial in the mayor's court, and by the same witnesses who proved the keeping of the disorderly house for the State on this trial. It is further agreed that under the original charter of the city of Dallas, the mayor of the city of Dallas has jurisdiction in criminal cases equal and concurrent with justices of the peace, and no greater. Defendant then read in evidence amendments to said charter."

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Statement of the case.

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Extract from section 21, amended charter of the city of Dallas:

"SECTION 21. The city council may, at any time after the adoption of this act, by ordinance, establish the office of recorder of said city, and order the election of a suitable person to fill the same, and, when elected and qualified, he shall be the chief judicial magistrate of the city, and shall hold his office until his successor is elected and qualified, the election of whom shall be at the next general election of city officers; and as such shall hold a court within said city by name of the recorder's court of the city of Dallas, which said court shall have concurrent jurisdiction and cognizance of all misdemeanors, breaches of the peace, infractions of the ordinances, and all other causes arising under the laws of said city; and said court shall also have concurrent jurisdiction of all misdemeanors arising under the criminal laws of this State within said city limits, in which the punishment is by fine only, or by fine or by imprisonment, or by both; provided that no fine shall exceed two hundred dollars, or period of imprisonment exceed thirty days in the city jail; and provided, further, that the said court shall have concurrent jurisdiction of all cases for keeping disorderly houses, or houses of prostitution within the limits of said city."

Section 62 of the amended charter of the city of Dallas:

"SECTION 62. The city council shall have the right to enact all necessary ordinances to restrain and punish vagabonds, mendicants, streets beggars and prostitutes; to locate, restrain, punish and control all disorderly houses of prostitution or assignation, and keeper and inmates thereof; to regulate, punish or control all gambling, and the keepers of games and gambling houses, and those who bet on games and gambling devices, where there is an ordinance of the city of Dallas in force punishing this or any other misdemeanor with as great a penalty as the same is punished by the statutes of the State. The mayor's court of the city of Dallas shall have concurrent jurisdiction of such misdemeanors when committed within the corporate limits of the city of Dallas."

The motion for new trial presented the questions discussed in the opinion.

*Stemmons & Field*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.



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Opinion of the court.

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HURT, JUDGE. This is an appeal from a conviction for keeping a disorderly house. The indictment was filed in the county court on May 25, 1883. On September 4, 1883, this case was called for trial, and both parties announcing ready, the cause went to trial.

In bar to this prosecution, the defendant interposed a plea of former acquittal before the mayor's court of the city of Dallas. In proof of this plea, it was shown that a trial in the mayor's court, upon a complaint charging appellant with keeping a disorderly house in the city of Dallas, in the county of Dallas, was had on the thirteenth of June, 1883, and that appellant was acquitted of the charge of keeping a disorderly house for the purpose of public prostitution; that the evidence in the mayor's court was the same as that introduced upon the trial of this case in the county court; that it covered and embraced the whole period of time for and including the fourth day of April, 1883 (at which last mentioned time appellant had been convicted, in the county court, for keeping a disorderly house in the city of Dallas), up to May 25, 1883, and that every act done by her in the keeping of the disorderly house during said period of time was proved on the said trial in the mayor's court, and by the witnesses who proved the keeping of the disorderly house for the State on this trial.

It has been and is now held by this court that, under the charter of the city of Dallas, the mayor's court has concurrent jurisdiction of this offense with the county court.

Under the above statement, we are clearly of opinion that, whether the keeping of a house for the purpose of public prostitution, and as a common resort for prostitutes and vagabonds, be an offense continuous in its nature or not, appellant's plea should have prevailed, for the record shows that the whole ground, all of the acts of the defendant, the full period of time, in fact, the time and acts required to complete the offense, were adduced in evidence upon the trial in the mayor's court, and that the same acts and time are relied on for a conviction upon the trial of this case.

It was not necessary, nor is it now urged by counsel for appellant, in support of appellant's plea, that this offense is continuous, and therefore one conviction or acquittal can be interposed in bar to a prosecution, which prosecution, to convict, must rely upon time covered by that which may have been embraced under the allegations of the first complaint or indictment.

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Syllabus.

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This issue, to wit, is this offense continuous in its character? was not considered by the learned judge presiding as involved in the case. The plea, in his opinion, was not supported by the evidence, simply because the punishment prescribed by an ordinance of the city for this offense was not as great as that imposed by the statutes of the State, and his honor below instructed the jury, in effect, to disregard the plea of appellant, because an ordinance of the city prescribed a penalty less than that prescribed by the statute. The record does not disclose any such ordinance, and the learned judge must have assumed its existence, or, believing that it was necessary for appellant to introduce in evidence an ordinance conforming the city penalty to that of the State, intended, by his charge, to convey this idea to the jury.

The Legislature having expressly conferred concurrent jurisdiction of this offense on the mayor's court, we will presume, until the contrary be proven, that the city has conformed the city penalty to that of the State; that is, that it is not less.

We are of the opinion that there was error in the charge of the court relating to this subject, for which the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 18, 1884.

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[No. 3142.]

NEWTON OWENS v. THE STATE.

1. MURDER—EVIDENCE—CONFESSIONS IN CUSTODY.—See the opinion *in extenso* for facts held to constitute such custody as to exclude the confession of an unwarned defendant. Note also evidence held not admissible under the rule which admits the unwarned confessions of facts by the accused which, being found to be true, conduce to the establishment of his guilt.
2. SAME—CASE APPROVED.—The ruling in *Weller's case*, *ante*, page 200, to the effect that if, in connection with the confession, a fact confessed was found to be true, and such fact conduces to establish guilt, the main fact, as well as all other facts, whether found true or not, are admissible, is approved. But see the opinion for evidence held not to come within the purview of the rule.

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Statement of the case.

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**APPEAL** from the District Court of Houston. Tried below before the Hon. J. R. Kennard.

The indictment charged the appellant with the murder of Mattie Murchison, in Houston county, Texas, on the twentieth day of December, 1883, by stabbing and cutting her with a knife. The conviction was for murder in the second degree, and a term of fifteen years in the penitentiary was the punishment awarded.

The first witness introduced by the State was William Stanton. He testified that he was personally acquainted with the defendant, but had no acquaintance with Mattie Murchison, though he had seen her. He recollected the evening on which she is said to have been killed. He saw the defendant on that evening on the road which leads through his, witness's, field. Defendant was then about three-quarters of a mile from where the killing is said to have occurred, and it was about mid-afternoon. Witness observed no blood on defendant's clothes at that time. He said nothing then to the witness about the deceased. The defendant was then traveling in the direction of his house. The defendant came to witness's house on the night after the day of the killing, after the witness had gone to bed. He told the witness that a little circumstance had happened, and that he wanted to tell witness about it. He then said that he and the deceased were walking along the road together, he on his way to Doze Gossett's, and the deceased on her way to Mrs. Leaverton's, when they met two white men armed with shot guns; that the white men took the woman away from him, and he feared they had killed her. He said that the white men ordered him to abandon the road and take to the woods; that his horse, which he had been leading, ran with him pretty fast through the woods, and finally brought him in collision with a limb, and that the blow made his nose bleed like a beef. The witness had known the defendant since he was quite small, and had always known him as a good boy. This was the first trouble witness had ever known him to be in.

Dick Stanton was the next witness for the State. He testified that he knew the deceased, Mattie Murchison. She was killed a few days before Christmas, 1883, in Houston county, Texas. The witness saw the defendant on the morning of the day Mattie was killed. The witness went to the house of Albert Jones on that morning, and while he was in Albert Jones's field the defendant rode up, saying that he was going down to Lewis Porter's. Wit-

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ness told his sister Laura then that he believed he would go down to old man Stanton's. The witness saw the defendant again that same evening in the old field at Mr. Stanton's, and spoke to him at a distance. The defendant said nothing to witness either time on that day about the deceased. The witness next saw the defendant at Albert Jones's house that night at about nine o'clock. The defendant then said that he had been more severely frightened that evening than he had ever before in his life; that two white men, armed with shot guns, ran on to him, searched him, and took the girl Mattie away from him; that one of the men took an old broken pistol from him and demanded his money; that one of them drew a knife, which he opened with his teeth, and told him to take to the woods and not to follow the road; that when they ordered him to leave one of the men put a gun to his face, and, pointing to the woman, said: "We will settle with her."

The witness saw the defendant again next morning, but he said nothing then. On the next (Saturday) night defendant was arrested. Wes. Owens, the defendant's brother, said nothing to witness about a handkerchief. While at the house of Albert Jones, the defendant, his brother Wes. and the witness went behind the house, and defendant said "if I was with the officers and others who tracked him, and I saw his handkerchief near a big hole of water, to get it and put it in my pocket and say nothing about it." He also told Wes. Owens to "get that knife and clean it."

Next morning, while still at Albert Jones's, defendant asked witness to swear that when witness overtook him in the old field he, defendant, then told him, witness, about Mattie Murchison. When the defendant met the witness on Friday morning near Albert Jones's, he asked witness to go with him to Porter's. Witness declined, saying the people around there had no good blood for him. The witness had been indicted for the theft of some hogs in that neighborhood, and that was why witness said that the people in that neighborhood had no good blood for him. It was about eight or nine o'clock in the morning when the defendant spoke to the witness about the handkerchief. Officers Ellis and Smith had not then arrived. Witness did not know whether they went to Albert Jones's at all. No one but Wes. Owens, the defendant's brother, was present when the defendant made the request of witness concerning the handkerchief. It was then two or three years since the witness and the defendant

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had a difficulty about a woman. That woman was now the witness's wife. Witness did not know why the defendant asked him to look for his handkerchief, and told Wes. in his presence to clean his knife. No one was present when the defendant asked witness to swear for him. That request was made on Saturday, but the witness did not remember where it was made. Witness had talked to his wife but not to his mother about the killing. Witness had nothing whatever to do with the killing of Mattie Murchison. When the witness first met the defendant at Albert Jones's it was about ten or eleven o'clock. He was then going in the direction of Billy Lewis's house, but said that he was going to Ike Porter's. Defendant then asked witness for tobacco. Witness asked him for a knife to cut it with, and he said that he had none. Witness said that he was mistaken in saying that the statement about the handkerchief was made on Saturday. It was made on Sunday. Albert Jones and George Owens were at the house.

The witness said nothing about the defendant's request about the handkerchief and knife before the jury of inquest, because he was not asked about it. Within an hour after the defendant made his request about the handkerchief and the knife, the witness saw Mr. Hill and Mr. Smith, the officers. He told the officers nothing about the handkerchief and knife matters, because he was afraid that he would be called as a witness. He knew that the officers were then in search of evidence. The witness believed that the body was found by Albert Jones, a white boy, and the defendant about noon on Saturday. The body lay about two hundred yards from the road. The deceased, when found, was lying on her back. The ground was not broken, but the leaves were "rustled up" about the body. The witness saw blood leading from the body to the road. He saw no horse tracks near the body, and no evidence of a horse having been hitched near the road. The difficulty the witness and defendant had about a woman arose over a handkerchief. When the defendant, on Sunday, made the requests about the handkerchief and knife, the witness stepped into the house and told his wife and sister Laura. Next day he told Joe Brown Stanton about it. Old man Georgo Owens, Wes. Owens and the defendant were in the yard when witness told his wife and Laura about the handkerchief and knife requests. The witness saw no cut place on the body of the deceased, a sack having been drawn over the wound. Witness did not say on the exam-

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ining trial that the first persons he told about the handkerchief and knife requests were Mr. Hill and Mr. Bayne, after he came to the town of Crockett. The body was found late on Saturday evening.

Henry Bean testified, for the State, that he remembered the day that Mattie Murchison was killed. Witness saw the defendant that night at his father's house. He had some blood drops on his breast, and marks like finger prints could be traced on his breast. His right shirt sleeve was stained with blood. Albert Jones was present. When the defendant came in and sat down, the witness asked him what he had done to his nose to make it bleed so. He replied that he had been more thoroughly frightened that evening than he had ever before been in his life; that while he and Mattie Murchison were walking along the road together, he going to Gossett's, and Mattie to Mrs. Leaverton's, two white men, armed with shot guns, halted him and asked him if he had any money; that he told them he had not; that one of them then took from his, defendant's, pocket, an old pistol that would not shoot; that the white men put their guns in his face when they demanded his money; that one of them then opened a knife with his teeth and said: "G—d d—n you, take to the woods; leave here, and don't you go back the road you come"; that they then pointed to Mattie and said: "D—n you, you come with us; we will take care of you"; that the deceased began crying, and he got on the horse he had been leading up to this time; that in his flight through the woods he struck the limb of a tree with his nose and it bled a great deal.

Albert Jones, witness and defendant, after defendant changed his coat and shirt, started to Albert Jones's house, going by Porter's house at the request of defendant, who said that Porter had told him that he, Porter, was going to Mrs. Leaverton's that night, and he wanted to ascertain whether or not deceased had ever reached Mrs. Leaverton's. The party named went on toward where the body of the deceased was afterward found, and defendant showed a place where he said the white men took the girl away from him. He, defendant, at that time, said that he heard the girl scream two or three times after the men took her off, and that he was afraid the men had killed her. Defendant repeated the story when the parties reached Albert Jones's house. All the parties present at first made light of the affair, but the defendant finally prevailed upon all to believe him. The party then went to Mr. William Stanton's, to whom,

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after he got out of bed, the defendant repeated the story. Witness afterward saw the defendant in the day time. He did not then notice any bruises about his nose. While at Albert Jones's house, the defendant asked for turpentine, and bathed his nose. When he came up to his father's that evening, he was riding swiftly. It was about one hour before sundown that defendant reached his father's house. The witness had not seen the defendant before on that day.

Cross-examined, the witness stated that when the defendant rode up to his father's house on the evening in question, there were present the witness, Albert Jones and the defendant's father and mother. Witness saw no other blood than that stated on the defendant's person. The witness saw the body of the deceased on Saturday evening. There were at least five houses within the radius of a half a mile from the place where the body was found. Mrs. Leaverton lived within about a mile from that point. The road was wooded on either side, denser on the side opposite that on which the body was found. The witness had no recollection of seeing the defendant wash his nose when he got home. The blood on his breast looked as though it had dropped from his nose. At the time that the deceased was killed, the witness lived at the house of Jake Stanton. The party named went to the various places that night for the purpose of discovering the fate of Mattie Murchison. The defendant related his narrative at every place they stopped. The party did not go to Mrs. Leaverton's. Witness saw no blood on the mane of the defendant's horse.

Frank Hill testified, for the State, that at the time of the homicide he was justice of the peace of precinct number one, Houston county, Texas. On Saturday morning the defendant came to the witness's office and related about the same story concerning the deceased, himself and two white men that he told the other witnesses. Witness told the defendant to go back and search for the girl; that he did not think he would find that she had been killed by the men. Next morning the defendant and Dick Stanton came to the witness's office and said that they had found the woman's body. Defendant said that he thought they had shot her through the side and cut her throat. Defendant said that he first told Dick Stanton of the encounter with the white men, and that they took the woman away from him about sundown.

Witness ordered a wagon to go to the body, and went there

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himself with the defendant and others. Witness asked the defendant if he had changed his coat and shirt. He first said that he had not, and then admitted that he had. He said that his clothes were at home to be washed, but that there was nothing on them. Witness went that night to defendant's father's house to see the clothes. The jeans coat and the white shirt were wet when witness saw them that (Saturday) night, about one o'clock. Witness did not, of his own knowledge, know that the clothes shown him were the ones that the defendant wore on the day that the killing occurred. At the point in the road where the defendant said that the woman was taken from him, the witness saw tracks, but he saw no tracks leading from the road to the point where the dead body was found. The body lay north, and a horse track led off in the opposite direction. The horse track was trailed to a small branch, where a shoe track corresponding with that in the road was found. A pair of fine boots was found at the house of the defendant's father, which corresponded with the tracks. Two hundred yards further on the witness and party came to another branch that had water in it, and found where a horse had been tied to a bush, and had walked around it. At this place they found a handkerchief in a pool of water, and foot prints at the edge of the water. The way the tracks went led up to Stanton's place.

The body of the deceased lay on the left side, with the head (hand?) on the chin. No wounds were discovered until the clothes were removed. The defendant described the two men minutely. One, he said, was a taller man than the other; one wore a black and the other a white hat, and one of them had on speckled pants. Witness saw a few drops of blood about twenty feet from the body. The leaves were stirred up between the body and the road. The hat of the deceased was found beyond the body. Mrs. Leaverton lived a half or three quarters of a mile distant from where the body was found. The clothes of the deceased were not torn. The deceased was about twenty years old, was over medium size, and would weigh about as much as the defendant. The witness saw spots on the handkerchief, but could not say they were blood spots. When the defendant first came to see witness he seemed positive that the woman was dead and that the men had killed her. Defendant admitted that, some eight or ten years before her death, he was criminally intimate with the deceased. Defendant appeared



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anxious to help find the murderer, and pointed out the course he followed with the woman. Witness found no pistol himself.

Albert Jones testified that he was at the house of the defendant's father on the day of the killing, when the defendant came home. As to what transpired that night, the witness testified substantially as did the witness Henry Bean, and in addition that, according to his recollection, the defendant washed his nose when he came to the house. Witness saw no blood on defendant's face or nose. At witness's house the defendant asked witness's wife for turpentine to bathe his nose.

Deputy Sheriff Ellis was the next witness for the State. He testified as did Hill concerning the finding of the body, the hat, the horse track, the boot track, the handkerchief, etc., and the conduct of the defendant on that occasion.

Doctor J. B. Smith testified, for the State, that he asked the defendant to describe the two white men who took the woman. Defendant said they were good looking men, well dressed, wore colored felt hats and about number six boots.

Frank Hill, recalled for the State, testified that defendant said that one of the men was about a hundred yards distant from him. The deceased had the appearance of being pregnant. The defense admitted that the wounds on deceased were mortal, and the State rested.

Lewis Porter was the first witness for the defense. He testified that he had known the defendant and the deceased all his life. Defendant and deceased were always friendly. Witness knew that the pistol the defendant owned at the time of the killing would not shoot. Both the defendant and the deceased were at the witness's house on Friday, the day of the killing. Deceased left witness's house about twelve o'clock, saying that she was going to Mrs. Leaverton's, to do which she would have to go by Billy Lewis's. When dinner was announced, the defendant left to go by Billy Lewis's to his father's. The defendant was horseback. The witness was present at the finding of the body of the deceased, and saw that her throat was cut. When defendant left the body, he said that he was going to make it known. Witness had some hogs marked at his house that day, the knife used in the work belonging to Henry Johnson. If the defendant had a knife at the witness's house witness did not know it. The face of the deceased, when found, was not covered with her sack. Witness stooped over but did not touch the body. Defendant left his horse at Albert Jones's, and walked with the

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party to hunt for the body. When he left the witness's house that day, the defendant took his broken pistol with him.

Billy Lewis testified, for the defense, that the defendant and the deceased were both at his house on the day of the killing. The deceased came first. When the defendant came he did not get down from his horse until the deceased asked him for a dip of snuff. The two remained about an hour, and started off together about two or three o'clock, the defendant leading his horse. Deceased said that she was going to Mrs. Leaverton's. The body of the deceased was afterwards found about a mile from the witness's house. Witness had never known any hard feeling between deceased and defendant. While at witness's house they hugged and kissed each other very affectionately. Henry Johnson came to witness's house just after the defendant and deceased left, and went on in the same direction they had gone. The witness never afterwards saw deceased alive. He saw the defendant again that evening going to Ike Porter's. Witness did not know whether or not Henry Johnson lived in the direction the parties all went when they left witness's house. Martin Van Buren's house was between witness's house and the place where the body was found.

Mrs. Meissell testified, for the defense, that she was teaching school in the neighborhood at the time of the killing. On her way to school on the day of the killing, between seven and eight o'clock, the witness saw two white men near the road. They were each armed with a shot gun. Witness noticed that each had his coat collar turned up and hat pulled down. She saw that they were looking at her, and she increased her speed. Each man had his pants in his boot legs. They were going in the direction of Mrs. Leaverton's house. These men said nothing to the witness. These men had on dark clothes. One wore a dark and one a white hat. Both men were large, but one taller than the other. They wore brown top boots. Witness had never seen either of these men since. They crossed the road ahead of witness, and walked right through a salt lick that was near. Witness offered on the Sunday before this trial to go and show Mr. Hill where these men crossed the road and salt lick, but he said that he had no time to go. The witness saw these men and was frightened by them, about two and a half miles from her school house.

The witness and her husband were at home on Saturday morning when the defendant rode up on his way to Crockett. He

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asked if witness or her husband had seen two white men. Defendant described the men exactly as the witness saw them, and related his adventures with them as he had to previous witnesses. He said that he heard no report of firearms after they took the woman, and that he was afraid they had cut her throat.

Witness then remarked that the men he described must have been the men she saw.

Wesley Owens, the defendant's brother, was his next witness. He testified that he was present at Albert Jones's house on the occasion referred to by Dick Stanton, and he denied positively the conversations about the handkerchief and knife related by Stanton. He had no conversation behind Jones's house, and heard none as stated by Stanton. Witness saw the defendant at home on Friday evening, and noticed a few drops of blood on his saddle horn. The witness picked up the defendant's broken pistol some twenty steps from the point where the deceased lay. If defendant owned a knife on the day of the killing the witness did not know it. Witness said nothing about finding the pistol and the blood on the saddle. He did not remember that Lewis Porter looked at the face of the deceased.

Minerva testified, for the defendant, that she was the mother of the deceased. She knew that the deceased was not pregnant when killed, from the fact that she miscarried about two weeks before her death.

Charlie Porter testified, for the defense, that he saw the defendant and the deceased together on the day of the killing. They were perfectly and noticeably friendly.

A. W. Ellis, for the State, in rebuttal, testified that he heard the testimony of Mrs. Meissell. Witness examined the salt lick for tracks, but discovered only horse and hog tracks. He found no human tracks at all. There was a very slight rain on Sunday morning, but not enough to obliterate tracks. Messrs. Hill and Smith made the examination of the salt lick with the witness. Witness did not dismount from his horse to look for tracks. The party arrested the defendant about daybreak on Sunday morning. They turned him over to his father, who was to deliver him at Martin Van Buren's house, which he did about sunrise.

Frank Hill, recalled by the State, in rebuttal, corroborated this last testimony of Ellis.

The motion for new trial was based upon the questions discussed in the opinion.

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*Cooper & Cooper*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

HUER, JUDGE. At the spring term of the district court of Houston county appellant was tried and convicted for the murder of Mattie Murchison; the jury finding him guilty of murder of the second degree, and assessing his punishment at fifteen years confinement in the penitentiary.

From this conviction he appeals to this court, and assigns numerous errors for a reversal of the judgment. We deem it necessary to notice and consider but two of the errors assigned. 1. That which relates to admissions of statements made by the defendant, he claiming that he made them while under arrest. 2. The sufficiency of the evidence to support the verdict.

To the first error assigned: It appears from the record that A. W. Ellis was deputy sheriff. Relating to the arrest of defendant, he says: "We had defendant arrested, and about day-break Sunday morning we turned him over to his father, George Owens, and he was to deliver him to us at Martin Van Buren's by the time we reached there, which he did about a half hour of sun." Now, while the defendant was in the custody of his father, before he was turned over to the deputy sheriff, Ellis, the witness Dick Stanton swears that "defendant, Wes. Owens and myself went behind the house, and defendant told me that if I was with the officers and others tracked him, and I saw his handkerchief near by a hole of water, to get it and put it in my pocket and say nothing about it. Defendant said to Wes. Owens to get that knife and clean it." These statements were introduced in evidence by the State over the objections of defendant, the objection being that when made he was under arrest.

This objection, it is insisted, is met by the State with these matters: 1. That defendant was not under arrest. 2. If he was, that the handkerchief was found in pursuance of the confession, and that therefore this matter was admissible under that part of Article 750, Code of Criminal Procedure, which provides that the confession may be used "when, in connection with such confession, he makes statement of facts or of circumstances that are found to be true, which conduce to establish his guilt," etc.

We are of the opinion that defendant was in confinement, and that to authorize his confessions to be used against him, he must

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have been cautioned that they could be used against him. This, it is conceded, was not done.

Did he make statement of fact or facts, or circumstances which conduced to establish his guilt? Let us concede that the handkerchief was found just where defendant said it could be found, did this fact conduce to establish his guilt? We think not under the circumstances relating to the handkerchief. Defendant had given minutely the route traveled by him after he left the two men with whom (he says) he left the deceased, Mattie Murchison. How, then, the fact that on this route his handkerchief was found where he said it could be found conduce to establish his guilt, we can not conceive. There was no blood on the handkerchief; at least the testimony fails to show that there was. That it was stained may be true, but certainly the evidence should show the character of this stain. Was it red, green or blue? Or what was its color? We cannot presume that it was stained with blood, nor can we presume that any fact conduces to establish guilt; this must be proven, and clearly proven in order to be made the basis for the introduction of other confessed facts which tend to criminate the defendant.

There being no fact found to be true which conduces to establish defendant's guilt, these statements or confessions were not admissible.

But it may be urged by the State that this statement, or confession, was harmless, as much so as the horse tracks found on his route in pursuance of his history of this matter. If his confession simply stopped with merely finding the handkerchief where he said it could be found, this would be so, but this is not the case. He desired Stanton to pocket the handkerchief and say nothing about it. In this we find very strong evidence of guilt—a desire to conceal that which he believed evidence of his guilt. And while it may be true that there was nothing in the fact that the handkerchief was left at the pool of water on his route conducing to establish his guilt, still defendant believed there was, and was solicitous that this evidence of his guilt (as he supposed) be concealed.

In addition to that which relates to the handkerchief, the State proved by Stanton that while defendant was in confinement, he requested his brother "to get that knife and clean it." Viewed in the light of the fact that deceased was killed with a knife, the request of defendant of his brother was evidence of a very strong and conclusive nature indeed. Its effect was equal

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almost to a direct confession of guilt. Mattie Murchison had been brutally murdered. Her murderer—the guilty demon—had cut her throat. Defendant was suspected of this most foul deed. Thus circumstanced, he says to his brother, “get that knife and clean it.” As above said, the effect of this request was a terrible confession, and was, without any sort of doubt, calculated to, and indeed did, have very great weight with the jury. The knife was not found, nor attempted to be found, with or without blood on it, in pursuance of this statement or request, and hence its introduction in evidence was clearly erroneous.

We are not to be understood to be holding that it was necessary to find a bloody knife in pursuance of the statement, in order to the admissibility of this matter in evidence. For this court this term decided (*Weller v. The State*, ante, p. 200) that where, in connection with the confession, a fact is confessed and found to be true, and such fact conduces to establish guilt, the main fact as well as all other facts are admissible, whether found to be true or not. The fatal objection to the admission of the statements of the defendant in this case consists in the fact that no fact confessed by him was found to be true which conduces to establish his guilt. That is, the fact found to be true was under the circumstances of this case not inculpatory. This being the case, he not first being cautioned, and being in confinement or under arrest, his statements, or confessions, are not evidence against him.

Does the evidence support the verdict? As we do not desire to prejudice the rights of the defendant we will not discuss the evidence, but must say that, were there no other reason for reversing this judgment, we could not do so for the reason that the verdict is not supported by the evidence. The objection to the charge of the court, reference being had to the facts in this case, is not well taken.

For the error of the court relating to the admission in evidence of the confessions of the defendant, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 18, 1884.

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Syllabus.

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[No. 3226.]

## J. H. COLE v. THE STATE.

1. **EMBEZZLEMENT—JURISDICTION—VENUE.**—The indictment contained two counts, one for embezzlement of goods held on commission by the accused, and the other for the conversion or embezzlement of the proceeds. The goods were received in B. county, and the proceeds converted in W. county. After the evidence was submitted, the State elected to claim a conviction on the count charging the embezzlement of the goods. *Held*, that the venue of the offense, under the count elected, was properly laid in B. county, the district court of which county had jurisdiction under Article 219 of the Code of Criminal Procedure, which provides that "the offense of embezzlement may be prosecuted in any county in which the offender may have taken or received the property, or through or into which he may have undertaken to transport it." Had the State elected to proceed on the second count, jurisdiction would have belonged to the district court of W. county, wherein the goods were sold and the proceeds appropriated.
2. **SAME—CHARGE OF THE COURT—INTENT.**—As defined in a former decision of this court (*Leonard v. The State*, 7 Texas Ct. App., 419), "embezzlement is a fraudulent appropriation of the property of another by a person to whom it has been entrusted. There is no settled mode by which this appropriation must take place, and it may occur in any of the numberless methods which may suggest itself to the particular individual. The mode of embezzlement is simply matter of evidence, and not pleading." In the same opinion, with regard to the question of intent, it is held: "If he (the accused) sold it (the property) with the honest purpose of delivering the proceeds to the owner, and after such sale conceived the fraudulent intention, he would not be guilty of embezzlement. \* \* \* But if the sale was simply a means to effectuate his fraudulent purpose to convert the property to his own use—in other words, to steal it—it is as much an act of conversion as if he had shipped it clandestinely to a foreign port and there disposed of it." The principle embraced in the requested charge on the subject having been, by the general charge, submitted in harmony with the rules thus declared, the requested charge was properly refused.
3. **NEWLY DISCOVERED EVIDENCE—NEW TRIAL**, asked upon the ground of newly discovered evidence, was properly refused, in view of the fact that such evidence, considered in the light of the evidence adduced, was not probably true.
4. **EVIDENCE—PRACTICE.**—Defendant's counsel, on cross-examination, asked the prosecuting witness, W.: "Did you or not ever receive an order from defendant on W. G. Cheney to pay your firm claim against him?" The court, on objection, ruled out the question as asked, and held that its

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proper form was: "Did you ever receive any order from the defendant before the prosecution was commenced?" *Held*, correct.

5. **EMBEZZLEMENT—FACT CASE.**—See evidence held sufficient to sustain a conviction for embezzlement.

APPEAL from the District Court of Bell. Tried below before the Hon. B. W. Rimes.

The conviction was for the embezzlement of the property of Wilson & Austin, exceeding in value the sum of one hundred and thirty dollars. A term of two years in the penitentiary was the punishment awarded.

J. L. Wilson was the first witness for the State. He testified that he was engaged in the hardware, tin and stove business in the town of Belton, Bell county, Texas. He was associated in that business with George N. Austin, under the firm name of Wilson & Austin. That firm was doing business in its present quarters in the year 1883. The witness first saw the defendant on the tenth day of September, 1883, when he came into the witness's store, introduced himself, and said that he wanted to purchase some goods. He said that he was merchandising in the town of Florence, Williamson county, Texas, and, with the view of making some purchases on time, made to the witness a statement of his financial condition. In reply the witness told him that his financial showing was perfectly good, but that he did not want to sell him any goods. After some further discussion of the matter, the witness agreed to let him have some goods on consignment, to sell on commission, and witness wrote out a commission contract which the defendant signed. That document was the same as that now in the possession of the witness. Witness wrote the whole of it, except the signature "J. H. Cole," which was signed by the defendant. After the execution of the contract the witness let him have the goods mentioned in the indictment, which bill of goods he, the defendant, received from the witness, in his store, in Belton, Bell county, Texas. He received them on and under the commission contract described.

The goods delivered to the defendant were to be sold by him for cash, and he was to account to Wilson & Austin for the same on the first day of each month. No special rate of commission was stipulated or agreed upon, but the goods delivered were marked down so that defendant could make large or small commission as he thought best. The paper exhibited to the witness



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was a copy of the bill of goods delivered to the defendant under the contract. These goods belonged to the firm of Wilson & Austin, and were worth, item by item, the amounts set out in the bill and in the indictment. All of the articles named in the bill were to be sold by the defendant on commission, except one box stove, of the value of \$9.25, sold on November 23, 1883, and a balance of twenty cents on solder. The defendant obtained the goods set out in the bill and the indictment from the firm of Wilson & Austin September 10, 1883. Witness never gave his consent, or agreed that Cole, the defendant, should sell or dispose of the goods except in the manner provided and agreed upon in the contract. The defendant came to Belton on the fifteenth day of December, 1883, to see witness and Austin. He told witness that he could make no settlement at that time, and witness gave him until January 10, 1884, in which to make his settlement. On the twenty-third day of November, 1883, the defendant paid the sum of forty dollars on the original bill, leaving one hundred and thirty dollars and seventy cents still due, from which the stove at nine dollars and twenty-five cents was to be deducted. Of this amount, stated as due, the defendant has never paid a cent, and has never returned any of the articles delivered to him by Wilson & Austin. A day or two after defendant's visit in December, 1883, witness sent C. C. Rather to Florence to make a settlement with him. Witness instructed Rather to collect the money for all goods sold, and to take possession of all goods remaining unsold that belonged to Wilson & Austin. Witness gave him a letter or order to defendant, authorizing defendant to make settlement. That letter or order was written under the commission contract on the same piece of paper.

The defendant Cole got possession of the goods described by virtue of his agreement to sell the same for Wilson & Austin on commission. Witness never, at any time, consented that the defendant should convert the goods to his own use, or dispose of them in any manner other than that stipulated in the contract. The defendant, at no time prior to the prosecution of this indictment, proposed to give Wilson & Austin an order on Mr. Cheney for the amount of his, defendant's, debt. Cheney called to see witness's firm in Belton in January, 1884, and again in March, but neither paid nor offered to pay any amount of money whatever for the defendant. C. C. Rather returned to Belton from Florence with neither money or goods. Defendant at no time

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Statement of the case.

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notified witness or Wilson & Austin that he expected or intended to remove from Florence. Witness could not, of his own knowledge, state that the defendant embezzled or misapplied the goods. The State then introduced in evidence the following:

“BILL OF GOODS.

BELTON, TEXAS, September 10, 1883.

Mr. J. H. Cole—Bought of Wilson & Austin, dealers in hardware, stoves, tinware, wagons and agricultural implements. East avenue. On consignment account.

To 2 Mohawk No. 7-16 stoves, \$10.50.....	\$21 00	
To 1 Mohawk No. 7-18 stove.....	12 75	
To 1 Central No. 7 stove.....	15 00	
To 1 Superior 7D stove.....	18 00	
To 1 Mohawk No. 8-20 stove.....	18 50	
To 2 Osage stoves No. 20, @ \$4.75.....	9 50	
To 2 Osage stoves No. 25, @ \$6.00.....	12 00	
To 2 Osage stoves No. 28, @ \$6.50.....	13 00	
To 2 Osage stoves No. 31, @ \$8.25.....	16 50	
To 2 Linden stoves No. 20, @ \$6 50.....	13 00	
September 12, 2 stoves, @ \$6.00. ....	12 00	
November 23, 1 Box stove .....	9 25	
“ “ bal. on solder.....	20	
“ “ by cash \$40.		
		<hr/>
	6170 70—	\$40 00
“ “ amount to bal.....		130 70
		<hr/>
	6170 70—	\$170 70
		<hr/>
“ “ to balance down.....	\$130 70	

The contract, written on a bill or letter head of Wilson & Austin, was then introduced in evidence by the State. It reads as follows:

“BELTON, TEXAS, September 10, 1883.

“*Wilson & Austin:*

“You will please send me the following bill of stoves, which I agree to keep the same in good order and on consignment for your acct. till sold, and I pledge myself to remit promptly on the first of each month for all goods of yours sold by me, and fur-

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Statement of the case.

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ther to turn over at any time all goods not sold, if called upon by you to do so, and said goods not to be taken only as consignment acct.

"J. H. COLE."

Under this contract was written the following order:

"We hereby authorize Mr. C. C. Rather to act as our agent, and to act for us in settling up with Mr. J. H. Cole.

"WILSON & AUSTIN."

George N. Austin was the next witness for the State. He testified that he was the junior member of the firm of Wilson & Austin, dealers in hardware, tinware and stoves, in the town of Belton, Bell county, Texas, and was such member of the said firm in the year 1883. The defendant came to the store of Wilson & Austin in September, 1883, to buy goods. Mr. Wilson, the senior member of the firm, did the trading with defendant, but the witness heard part of what was said by the parties. Wilson refused to sell the defendant any goods, but after some discussion agreed to let him have some to sell on commission. Wilson wrote out a consignment contract and the defendant signed it. Witness heard Mr. Wilson say to the defendant: "Now, Mr. Cole, do you understand this matter? If you get away with these goods you will be liable to go to the penitentiary." The defendant replied: "Yes, I understand that." After the execution of the consignment contract, Mr. Wilson let the defendant have the goods mentioned in the indictment, which he, defendant, received in the store house of Wilson & Austin, in the town of Belton, Bell county, Texas, on the tenth day of September, 1883. The defendant has never since paid for the goods, nor has he ever returned the goods, or any part of them, to Wilson & Austin.

The defendant visited witness's firm in Belton on the fifteenth day of December, 1883. A day or two after that visit the firm sent Mr. C. C. Rather to Florence, with instructions to collect the proceeds of the goods sold, and to take possession of the goods unsold. Rather returned to Belton with neither money nor goods. The witness had never consented that the defendant should dispose of the goods in any manner other than that provided for in the consignment contract. He had never consented that the defendant should misapply or otherwise con-

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Statement of the case.

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vert them to his own use. Defendant got possession of the goods under contract to sell them on commission. They were never sold to him.

C. C. Rather was next witness for the State. He testified that three or four days before Christmas, 1883, Wilson & Austin, and several other merchants in Belton, Texas, employed the witness to go to Florence, Williamson county, for the purpose of making business settlements for them with J. H. Cole, the defendant. Witness went to Florence, but failed to find Cole. He saw a house in Florence in which the defendant was said to have conducted business, but it was empty and unoccupied, and witness could find no trace of Cole or the goods. Wilson & Austin directed witness to collect from Cole all moneys for goods sold, and to take possession of all goods belonging to them, unsold. Failing to find the defendant, the witness returned to Belton. While at Belton the witness met Mr. S. R. Seratt, constable of precinct number four, Williamson county, and told him his, witness's, business, at Florence. The house recently occupied by defendant contained one stove.

The State next introduced S. R. Seratt as a witness. He testified that he resided at Florence, Williamson county, Texas, and was constable of that precinct. He was acquainted with the defendant, J. H. Cole. Cole was a tinner by trade. He had a store at Florence in the year 1883, in which he had a stock of hardware, tinware, stoves and wire. He, defendant, closed out or broke up his business at Florence about the middle of December, 1883. Witness did not know exactly how or when he left. All that witness could say about it was that he was at Cole's store one evening, when the business appeared to be going on as usual. Witness went to the country the same evening and returned the next afternoon, when he found the store house empty and Cole gone. Witness followed to Georgetown, about sixteen miles distant, but failed to find Cole or any trace of the goods. Witness never saw Cole from that time until during the present term of the Bell county district court.

Cole's family did not leave Florence with him, but remained at the house of W. G. Cheney, Mrs. Cole's father, where they still are. An attachment for Mr. Cheney as a witness for the defense was placed in the hands of the witness to be served. The witness thought he saw Cheney standing in the door of his house a day or two before this trial, and went to the house to serve the attachment, but Mrs. Cole closed the door in his face

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Statement of the case.

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and would not let him in. Witness was not willing to force the door to serve an attachment, so he told Mrs. Cole that he wanted to serve Cheney as a witness for her husband, but Mrs. Cole locked the door. Witness waited around the house for half a day to serve Mr. Cheney, but he avoided service by staying in the house. C. C. Rather arrived in Florence three or four days after Cole left. Rather's business was to collect claims for some Belton merchants. Witness did not know whether or not Cole went off in search of trade work.

Allen Wade was the next witness introduced by the State. He testified that he lived about four miles distant from the town of Florence, in Williamson county. The witness owned a wagon and team, and frequently hauled freight for wages. He was acquainted with the defendant. Defendant was in business in Florence in December, 1883. On or about the middle of that month Cole told the witness that he wanted witness to haul a load for him to Georgetown, a distance of sixteen miles. He agreed to pay the witness five dollars in money and a gallon of whisky for the job. Cole hired Ewen Queen and his wagon, and two others beside the witness. The wagons were loaded late in the evening, and the journey to Georgetown was commenced about ten o'clock at night. The loads consisted of stoves, tinware and barbed wire. Witness and the others of the freight party reached Georgetown between seven and eight o'clock next morning, and the witness delivered his load at the hardware store of Mr. J. H. Gholson. Cole was present, and paid the party for hauling the goods. Cole said, when the party was loading on the night before, that he was anxious to catch the train at Georgetown. Witness did not see him take the train that day, and did not know where Cole went, but witness did not see him again until he saw him on this trial.

Ewen Queen testified, for the State, that he assisted Allen Wade and two others in hauling Cole's goods to Georgetown, where they were delivered to J. H. Gholson.

J. H. Gholson was the next witness for the State. He testified that he resided in Georgetown, Williamson county, Texas. Early one morning in December, 1883, some days after the middle of that month, the defendant came to witness, at his store in Georgetown, and proposed to sell the witness some stoves, tinware and fencing wire, of which he had some three or four wagon loads. After some conversation the witness bought the lot for two hundred dollars, paying for the same partly in cash

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Statement of the case.

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and partly in short time notes. Among the stoves so purchased from the defendant by the witness were some "Mohawk," "Superior," and "Osage" stoves, corresponding with those mentioned in Wilson & Austin's bill of September 10, 1883. Defendant told the witness that he was going on to San Antonio. He had worked for the witness a year before he went to Florence. He always paid his debts to the witness. Witness had never heard any discussion of his reputation for honesty. When the witness paid Cole, and handed him the notes for the balance. Cole turned the notes over to his father-in-law, W. G. Cheney, and told witness to pay the amount of the notes to Cheney, which the witness did within the next two or three weeks. Witness did not hear Cole tell Cheney to collect the notes and pay Wilson & Austin's claim. If he gave Cheney any such direction in the presence of the witness, the witness had no recollection of it. If Cole made any statement as to his object in leaving the notes for collection in the hands of Cheney, witness had no recollection of it. Cole did say that he owed some debts in Belton, every cent of which he intended to pay. He said that he was going to San Antonio from Georgetown. San Antonio was on the route to Laredo.

R. W. Fulwiler testified, for the State, that he was the sheriff of Bell county, Texas, and held that office in 1883. On or about the first of January, 1884, a *captas* from the justice's court of precinct number one of Bell county, for the arrest of the defendant, was placed in his hands for service. The charge was embezzlement. Witness telegraphed to the sheriffs of various counties, and soon received a telegram from Laredo that defendant was in custody. Witness thereupon sent his deputy, W. G. Taylor, to Laredo, and Taylor brought the defendant back to Bell county on the twelfth of January, 1884. The State closed.

William McVay was the first witness for the defense. He testified that during the months of September, October, November and up to the middle of December, 1883, he clerked for the defendant in his store in Florence, Williamson county, Texas. The witness sold goods only, and had no knowledge whatever of how defendant secured his goods or upon which character of contracts he obtained them. Cole was a tinner by trade, but sold stoves and wire as well. Witness never saw his bills, and could not say upon what terms he procured goods.

Ira Hickman testified, for the defense, that in September, 1883,

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Opinion of the court.

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he hauled a load of stoves from Belton to Florence for the defendant. He did not hear the trade for the stoves, nor did he know the name of the man from whom Cole bought or got them.

W. G. Taylor, deputy sheriff of Bell county, testified that he went to Laredo, Texas, after the defendant, in January, 1884. He found defendant in jail and brought him back to Belton.

Among a number of other grounds, the motion for new trial presented the questions discussed in the opinion.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Appellant's conviction was upon an indictment for embezzlement, which originally contained two counts; one for the embezzlement of goods placed in his hands as agent of, and to be sold by him on commission for, Austin & Wilson; and the other for the fraudulent conversion or embezzlement of the money received by him as agent on the sale of said goods. After the evidence was elicited, the district attorney elected to claim a conviction on the count for the embezzlement of the property, and the other count was abandoned.

This prosecution was had in the district court of Bell county. The property, if converted or embezzled, was so embezzled in the county of Williamson. We have a statute specially regulating the venue in cases of embezzlement. It provides that "the offense of embezzlement may be prosecuted in any county in which the offender may have taken or received the property, or through or into which he may have undertaken to transport it." (Code Crim. Proc., Art. 219.) It is in proof that the goods alleged to have been embezzled were "received" by appellant in Bell county, and under the statute the venue could properly be laid, as was done, in that county. Had the indictment, or rather the count upon which the defendant was tried, been for the embezzlement of the money or proceeds arising from the sale of the property, then, indeed, the district court of Bell county would have had no jurisdiction, since the goods were sold and the money received and embezzled in the county of Williamson.

Exception was taken by defendant to the charge of the court, but the general charge, together with the specially requested instructions of defendant, which were given, submitted fully the

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Opinion of the court.

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law as announced by this court in *Leonard v. The State*, 7 Texas Court of Appeals, 419. In that case it was said embezzlement is "a fraudulent appropriation of the property of another by a person to whom it has been entrusted. There is no settled mode by which this appropriation must take place, and it may occur in any of the numberless methods which may suggest itself to the particular individual. The mode of embezzlement is simply matter of evidence and not pleading. \* \* \* If he, appellant, sold it with the honest purpose of delivering the proceeds to the owner, and after such sale conceived the fraudulent intention, he would not be guilty of embezzlement. \* \* \* But if the sale was simply a means to effectuate his fraudulent purpose to convert the property to his own use—in other words to steal it—it is as much an act of conversion as if he had shipped it clandestinely to a foreign port and there disposed of it."

Having thus submitted the law, it was not error to refuse defendant's third special requested instruction, because the principle announced in it was embraced in the general charge.

The testimony sought from the absent witness, Cheney, who was the father-in-law of defendant, is not probably true when considered in the light of the other evidence elicited at the trial, and we cannot say that the court erred in refusing the new trial in so far as that proposed evidence was concerned.

Defendant's counsel, on cross-examination, asked the prosecuting witness Wilson, "Did you or not ever receive an order from defendant on W. G. Cheney to pay your firm claim against him?" On objection by the State that the question was improper and irrelevant, the court sustained the objection, holding that the proper question should be, "Did you ever receive any order from defendant before the prosecution was commenced." This ruling was correct.

The other errors complained of are not considered well taken. We find no reversible error in the record. This conviction for embezzlement is in our opinion amply sustained by the evidence, and the trial in all respects appears to have been fair and impartial.

The judgment is affirmed.

*Affirmed.*

Opinion delivered June 18, 1884.



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Opinion of the court.

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[No. 3218.]

## WILLIAM TUCKER v. THE STATE.

1. **THEFT—POSSESSION OF RECENTLY STOLEN PROPERTY—CHARGE OF THE COURT** on the subject of possession of recently stolen property was as follows: "The possession alone of property shown to have been recently stolen is not in law sufficient to warrant the conviction of one charged with theft. Such possession, if proven, is only a circumstance for the jury to weigh and consider in connection with other established facts, in determining whether the accused is guilty of the offense charged or not. If, therefore, the alleged horse was stolen as charged, and if the said horse has been traced to the possession of defendant, such possession, if unsupported by other evidence, will not warrant the defendant's conviction; and if such be the case you will acquit the defendant. If, however, you find that such possession, if shown, is corroborated by other evidence, then, to warrant the defendant's conviction, all the evidence, taken and considered together, including the fact of possession, if it exists, should be sufficient to exclude from your minds every reasonable theory consistent with the defendant's innocence." *Held*, error, inasmuch as the charge was calculated to impress the jury with the idea that, if the mere fact of possession was corroborated, they were authorized to convict. The rule upon the subject is that there must be other evidence of guilt besides recent possession, and that such evidence, together with the recent possession, must be sufficient to establish in the minds of the jury the defendant's guilt to a moral certainty, beyond a reasonable doubt.
2. **SAME—FACT CASE.**—See the opinion for a summary of evidence *held* insufficient to sustain a conviction for horse theft.

**APPEAL** from the District Court of Erath. Tried below before the Hon. T. L. Nugent.

The conviction was for the theft of a horse, the property of J. N. Carr, in Erath county, Texas, on the twenty-sixth day of October, 1882. A term of seven years in the penitentiary was the punishment awarded. The case is substantially stated in the opinion.

*Frank & Devine and Neill & Young*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WHITE, PRESIDING JUDGE.** In substance, the evidence upon which this conviction was had was this: Carr's horse was

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Opinion of the court.

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stolen, in Erath county, about the twenty-sixth of October, 1882. About a month before the horse was stolen, appellant was seen in the neighborhood. The last of October or first of November, 1882, appellant came to the house of S. B. Walker, in Mason county, one hundred and fifty miles from Erath county, and was riding a horse in every way filling the description of Carr's stolen horse, and defendant "said he was just back from Mexico." This is, in brief, all the evidence.

Upon the subject of recent possession, the court charged the jury "that the possession alone of property shown to have been recently stolen is not in law sufficient to warrant the conviction of one charged with theft. Such possession, if proven, is only a circumstance for the jury to weigh and consider in connection with other established facts in determining whether the accused is guilty of the offense charged or not. If, therefore, the alleged horse was stolen as charged, and if the said horse has been traced to the possession of defendant, such possession, if unsupported by other evidence, will not warrant the defendant's conviction; and, if such be the case, you will acquit the defendant. If, however, you find that such possession, if shown, is corroborated by other evidence, then, to warrant the defendant's conviction, all the evidence, taken and considered together, including the fact of possession, if it exists, should be sufficient to exclude from your minds every reasonable theory consistent with defendant's innocence."

This instruction was objected to, and is complained of and assigned as error. However comprehensive the charge may appear to the legal mind, we fear it was calculated, and did, mislead the jury by impressing them with the idea that if the mere fact of "*possession*" was "*corroborated*" that would be sufficient to establish guilt. There was no question about "*possession*" and "*recent possession*." The evidence, if it established anything, established "*recent possession*," and that fact needed no "*corroboration*." What the jury should have been told was, in effect, that, though recent possession be established, still, unless the other evidence in the case tended to connect defendant with the fraudulent taking of the animal, he would be entitled to an acquittal; in other words, that there must be other evidence of guilt besides the recent possession, and that these evidences, together with the recent possession, must be sufficient to establish in the minds of the jury defendant's guilt to a moral certainty, beyond a reasonable doubt.

## Syllabus.

Because the charge was calculated to, and perhaps did, mislead the jury, and because the evidence is insufficient to support the verdict and judgment, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 18, 1884.

[No. 3192.]

## T. J. CARTWRIGHT v. THE STATE.

1. EVIDENCE—PRACTICE.—It was proper to permit the State to prove that a few minutes after the deceased and his brother were shot, the defendant and another man were seen at the house of the deceased's father, and also to prove the language and conduct of the defendant at that time and place. The said testimony related to matters which transpired immediately after the shooting, and were closely connected with the shooting, and therefore they were part of the *res gesta*.
2. CHARGE OF THE COURT—PRINCIPALS IN CRIME—MANSLAUGHTER.—The law of principals in crime applies as well to manslaughter as to any other offense. Though there can be no accomplice in manslaughter, several persons may so act together as to become principals in its commission. It is not, therefore, error to instruct the jury that the defendant might be convicted of manslaughter, although he did not himself inflict the mortal wound.
3. SAME—SELF-DEFENSE.—Upon the subject of self-defense, which was clearly presented by the evidence, the court charged as follows: "The jury are further charged, that if the killing was done in the necessary defense of the slayer, or any of them; that is, to protect himself or themselves from immediate and imminent danger of death or great bodily harm from the violence of the deceased, which was not provoked or sought for by the slayer, and which could not be avoided by any other means except retreating, then it would not be an unlawful killing, but would be justifiable homicide." *Held*, insufficient. In the first place, if the slayer is in immediate and imminent danger of death or serious bodily harm from the violence of the deceased, he is not required to resort to other means than killing his assailant to protect himself, but in such case he is justified in acting promptly and slaying his adversary at once. In the second place, the charge erroneously limits the right of self-defense to actual danger of death or serious bodily harm, whereas the true rule is that if appearances are such as to create in the mind of the slayer a reasonable apprehension of death or serious bodily harm, and he acts under the influence of this apprehension, he acts in self-defense, although there was in fact no danger of his being killed or receiving serious bodily injury.

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29	809
16	473
31	74

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In the third place, the charge, in view of the evidence in this case, erroneously restricted the right of self-defense to defense against the violence of the deceased alone. See the opinion *in extenso* on the question.

4. MURDER—CHARGE OF THE COURT presented the following instructions to the jury: "In considering the guilt or innocence of the defendant on trial, the jury are instructed that no act on the part of Tom Gill or others would justify or excuse the killing of Mark Gill, unless such other party acted under the advice or under the control of Mark Gill." *Held*, error, inasmuch as it did not require the advice to or control over Tom Gill or others to make the deceased a participant in their acts, and responsible therefor; but if deceased acted together with them, and, knowing their unlawful intent, aided them by acts, or encouraged them by words or gestures in the commission of the violence, or agreed thereto, then he was a principal in the assault upon defendant, and was subject to the same rules as if he was the person who actually committed the assault.
5. PRACTICE—PRIVILEGE OF COUNSEL.—Note in the opinion the animadversion of this court upon a gross breach of decorum by the bystanders, and a palpable abuse of the privilege of argument by counsel, and upon the failure of the court to reprimand the same, and to admonish the jury in regard thereto.

APPEAL from the District Court of Wise. Tried below before Charles Soward, Esq., Special Judge.

The indictment in this case was joint against the appellant, Bunk Allen and Ed. Johnson, and charged them with the murder of Mack Gill, in Wise county, Texas, on the twenty-third day of December, 1882. The appellant, being alone upon trial, was convicted of manslaughter, and his punishment was affixed at a term of two years in the penitentiary.

The first witness introduced by the State was B. F. Johnson. He testified that he was in the town of Decatur, Wise county, Texas, on the night of December 23, 1882. Between twelve and one o'clock on that night he left the public square with the deceased and Tom Gill, a brother of the deceased, and went with them to the residence of their father, G. W. Gill, to remain all night. Witness, the deceased and Tom Gill went to the room assigned them, and Mack Gill, the deceased, pulled off both his overcoat and dress coat, with the purpose of retiring. At this time Tom Gill proposed to go to the barn and feed his horse. Witness and deceased went with him. They had been at the barn a short time when they saw four or five men coming toward the barn from the direction of a bawdy house that stood some thirty or forty steps west from the barn. These men passed along by the lot gate on the north side of the lot, going

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Statement of the case.

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in the direction of a horse that stood a few feet from, and to the right of the said gate, near a corn pen. The deceased and Tom Gill hailed this party and asked them "What in the h—ll they were doing there at that time of night?" The party gave some short reply, and the deceased opened the gate and he, Tom and witness all went out. Some one of the party pushed the deceased back, whereupon the deceased knocked that individual down with his fist. The man raised up and struck the deceased on the right cheek with a rock. Tom Gill then knocked some one of the party down. About this time the party started back toward the bawdy house, the deceased took a position a little farther removed from the gate, and Tom Gill went around the west side of the barn and speedily returned with a gun.

A very few moments later the witness saw the parties leave the bawdy house and start back toward the gate. The party had now been reinforced until it numbered some twelve or fifteen men. Witness stepped back inside the gate and took a position near it. The party rushed up toward the place where Mack and Tom Gill were standing, some of them with pistols drawn, and when they had approached within twelve or fifteen feet of the two Gills they opened fire. The deceased fell at about the second or third shot. Witness then saw Tom Gill stagger as though he was shot, and then saw him turn around, fall to his knees and fire one shot in the direction of the party. Tom then started toward the gate, and witness started to the house. As he was going to the house the witness looked back and saw Tom passing through the inside gate leading from the lot to the house. The party were still firing. Soon after witness reached the house Tom came in and said: "Poor Mack is killed, and I am shot through and can't live." Witness started to go for a doctor, but, seeing two men standing in the street, returned, and Miss Dessie Gill went after the doctor.

The witness did not see either the deceased or Tom Gill with a pistol that day or night. Mack Gill died from the effects of a gun shot wound in the head, inflicted in Wise county, Texas. The deceased did not strike Tom Cartwright, the defendant, nor did he fire a shot, that the witness saw. The deceased was in his shirt sleeves at the time he was shot. The witness was not armed, nor did he fire a shot. The witness made an effort to stop the difficulty when it first began. He said to deceased and Tom Gill: "Boys, you are wrong; it is their horse."

Cross-examined, the witness testified that when the reinforced

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party came up from the bawdy house, Tom Gill was standing near the northwest corner of the barn, holding his Winchester rifle in both hands. He held it out, drawn, but the witness could not say that it was presented. As stated, the witness made an effort to stop the first difficulty, saying: "Boys, this is all wrong." Tom and Mack Gill were both under the influence of whisky. Witness did not know how much they had drunk, but they were not to say drunk. The witness did not see the deceased do anything of a belligerent character when the parties returned from the bawdy house the second time. He struck no one that the witness saw. Witness and the two Gills had been to a saloon before the shooting, and from there went to Mr. Gill's house. Witness was in the lot when the shooting began, standing five or six feet from the northeast corner of the barn and about five feet from the gate, which was at the northeast corner of the barn. The witness did not see the man strike the deceased with a rock, but saw the rock lying on the ground and supposed it to be the one with which the deceased was struck. Something was said about a rock.

Tom Gill testified, for the State, that he was the brother of the deceased. He had been with the witness B. F. Johnson and the deceased some three-quarters of an hour prior to the latter's death. They left the square together to go to the house of witness's father, to remain over night. On reaching the sleeping apartment deceased pulled off his coat, preparing to go to bed, when witness proposed to go to the lot to feed his horse, and went, accompanied by deceased and Johnson. While there, four or five men came up to the gate, which is situated at the northeast corner of the barn. A saddled horse stood some six or eight feet to the right of the gate. Some one of witness's party asked the men what they were doing there at that time of night. They replied: "It is none of your d—d business." Thereupon the deceased opened the gate, and he, witness and Johnson passed out, the deceased first, witness next and Johnson last. When the deceased got out, he and some one of the party had some words; deceased knocked that man down, and was, in turn, struck on the cheek by some other member of the party with a stone. The party then left, going toward the bawdy house. The witness went around the barn to the west side, pulled off a plank and secured his gun, telling Johnson to go into the barn. The deceased in the meantime had walked to a point on the outside of the lot some ten or fifteen feet west of the north line from the

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northwest corner of the barn. The witness then saw a party coming from the bawdy house toward the party at the barn. The witness was then between Mack and the gate. The bawdy house was a little south of west from the barn. As the party approached, the deceased threw up his hands, and the party fired. The deceased made two or three very high steps backward and fell, shot through the head. Witness did not know who of the party killed him, but saw flashes from five or six pistols. Witness then stepped forward to catch deceased, but received two wounds himself, one through the bowels and one in the thigh. Falling to his knees, he threw a cartridge in his gun and fired one shot. He made an effort to shoot again, but had no cartridge in his gun and his gun lever caught fast. Witness then retreated into the lot, the party continuing to fire upon him until he got into the yard. Witness then went into the house and was not out again for twenty or twenty-five days.

The deceased had a small, single barreled derringer pistol in his vest pocket when he started to go out at the gate at the time of the first difficulty, which the witness took from him and deposited in his own coat pocket. As witness took possession of this pistol the deceased reached for it. When the deceased was killed he was unarmed, so far as the witness knew. At all events he used no arms and shot no weapon. No shots were fired after the witness reached the yard from the lot, on his retreat. Witness heard no words spoken just before the shooting occurred. The efforts of the witness, when the party first came, were directed solely to keeping the peace. He had his gun, holding it down by his side when the party returned, and he fired the one shot only, as described.

\*Cross-examined, the witness stated that when the party first approached the barn he was uncertain whether or not the horse standing near the gate was his. He thought then that the party was intent on stealing corn for their horses, or perhaps intended to steal horses. Many things kept about the barn had been missed. A bridle had been stolen from the barn a short time before. Witness's family had often been annoyed by parties frequenting the bawdy house. The second party that came from the bawdy house the witness took to be the original crowd with reinforcements, returning to take corn. Witness took possession of the deceased's pistol as the deceased went out at the gate, because he was afraid the deceased would get into a difficulty with the crowd outside. One of the men who came to the

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gate claimed the horse as his. Witness, after examination, found that the animal did not belong to him. After the witness was shot, and had got back into the lot, some one of the party ordered him to throw down his gun. Witness replied that the gun was out of fix and would not shoot. Some one of the party then said: "Hold up, boys." The small XL derringer which witness took from the deceased he put in his coat pocket, where, on information furnished by the witness, the coroner's jury found it next morning. The party fired at the witness on his retreat through the lot until the barn intervened, and recommenced firing as soon as he passed the barn and forged in sight, and continued to fire until he got inside the yard. Deceased had no pistol other than the derringer described during the day, that the witness saw.

G. W. Gill, the father of the deceased, was the next witness for the State. He testified that Mack Gill died on the night of December 23, 1882, from the effects of a pistol shot through the forehead. He also had a wound on the cheek. The witness heard some twenty or twenty-five pistol or gun shots discharged between twelve and two o'clock on that night, at which time witness was in bed. Two shots were fired a very short time after Tom Gill got inside of the house. Both of these shots entered the house. About two minutes after Tom Gill entered the house, witness started out at the south door of the east room of his house, and saw the defendant and also another man, whom he did not recognize but who corresponded in size to Bunk Allen, standing in the street, east of the house and near the gate. That street was about twenty steps east of the house. Both the defendant and his companion had pistols in their hands. The defendant was marshal of the town of Decatur, knew the witness, and knew the witness's residence. He also knew the deceased.

The witness's barn stood in the northwest corner of his lot, the north and west sides of the barn forming a part of the lot fence. The distance between the barn and residence, which were separated by a cross fence, was about forty yards. There was a gate in this cross fence, connecting the barn lot and the house yard. The witness had been frequently annoyed by persons frequenting the bawdy house near by, and had complained both to the mayor and the town marshal (the defendant), but had never made affidavit against any one on account of the annoyance. The witness went back into his house when he saw the defend-



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ant and his companion standing in the street with drawn pistols. The witness had lost one eye in his youth, and was consequently deficient in eyesight. Two shots went through the west end of the house into the west room.

G. W. Trenchard was the next witness for the State. He testified that at the time of the homicide he was occupying quarters in the house of R. M. Beville, near the residence of G. W. Gill. He heard about twenty or twenty-five shots on the night that the deceased was killed. Witness went over to Gill's residence, and was there informed that Mack Gill had been killed near the lot. Witness went through the lot to the body, reaching it about eight minutes after the shooting. The witness examined the ground about the body for a pistol, but found none. He saw no arms about it, but did not make a very close examination. The witness left the body by the same route he came to it, and shortly returned with Mr. R. M. Beville, and again a search for weapons was unsuccessfully made. Beville turned the body partially over in the search for weapons. The witness did not know who removed the body of the deceased or undressed it. Witness saw Ed. Johnson near the mouth of the street, between the residences of R. M. Beville and G. W. Gill. The witness was city attorney of Decatur at the time of the homicide. The defendant was then town marshal; Bunk Allen was his deputy; William Gilbert was deputy sheriff, and Ed. Johnson was on duty as special policeman. Beville's house stood south of and across an alley from Gill's. The main street was east of Gill's house.

Frank Lovejoy testified, for the State, that he was at the bawdy house on the night of the killing. He saw the defendant, Bunk Allen, Ed. Johnson and others there. About one o'clock that night, Dave Bailey and others came into the bawdy house and told the defendant that some horse thieves had taken possession of his, Bailey's, horse, and had knocked him down. Witness saw blood on Bailey's face. Bailey made a demand on defendant for protection and assistance to recover his horse. The defendant, Bunk Allen, Ed. Johnson, William Gilbert and others went toward Gill's barn together, the witness following them a short distance behind. Witness saw parties at or near the barn, but did not then know them. When the defendant and the parties with him reached the ground, the witness saw the defendant fall down backward, and the shooting began. Witness could not tell who fired the first shot. The deceased

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fell at the third or fourth shot. The witness saw the defendant fire one shot at the deceased while he, defendant, was on the ground, and before he got up. Witness saw no pistols before the shooting began. The defendant fell backward, and the witness thought he caught on his left hand. This was before the witness got on the ground. He saw no one strike the defendant. When the deceased fell, the witness jumped over the west string of the fence into the lot, ran down the fence, crossed it again, and returned to the bawdy house. The bawdy house stood about one hundred feet, a little south of west, from the northwest corner of Gill's barn. There was an open space between the barn and the bawdy house, no obstruction intervening.

Mrs. Dena Cates testified, for the State, that she was a sister of the deceased and Tom Gill. She was at her father's house on the night of the killing of the one and the wounding of the other of her brothers. She had been to a performance that night, had but shortly returned, and had not yet retired when the shooting occurred. Two shots entered the west room of the house, after Tom Gill had come in the house. Witness went to the gate with her sister Dessie, when the latter started to get some one to go for a doctor, and when they got to the gate the witness saw two men standing near it in the street, with pistols in their hands. The defendant was one of those men. Witness did not recognize the other. Dessie spoke to the men, told them that one of her brothers had been killed and another wounded, and asked them to get a doctor for the wounded one. The defendant thereupon pointed his pistol at the witness and her sister, and said: "G—d d—n you, go in the house, or I will blow your brains out." Dessie was then in her night clothes. Witness had on her dress but no shoes. The witness had never seen the defendant before that night, and did not know him then. She saw him at the examining trial a few days afterward and recognized him, though she did not point him out. She was not then asked to point him out. Witness did not tell that the defendant was one of the men she saw at the gate until six months after the killing. After Dessie went back into the house the defendant and his companion passed through the gate, up on the porch, and pushed at the door.

Miss Dessie Gill was the next witness for the State. She testified that, after her brother Tom came into the house, wounded, she started to Mr. Beville's to get some one to go for a doctor. When she got to the cross street between her father's and Mr.

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Beville's houses, she saw Ed. Johnson coming up the street from the west, with a pistol in his hand. The witness afterward saw Mr. Beville coming from toward Newton's house, and told him to go after a doctor. Witness then went back to the house, and in a few minutes again went out with her sister, Mrs. Dena Cates. They got near the east or front gate, when witness saw two men, each with a pistol in his hand, standing in the street near the gate. Witness did not know these men. One was a very tall man. Witness told them that her brother Mack had been killed and her brother Tom wounded, and asked them to go for a doctor. The men cursed witness and her sister, and told them to go back into the house, which witness and her sister did. Witness could not repeat the language used by the two men. After witness and Dena got back into the house somebody stepped up on the porch, and turned the door knob, but did not enter the house. The tall man at the gate was about the size of the defendant.

Mrs. Gill, the mother of the deceased, testified, for the State, that the deceased had two pistols, one a small black handled single barreled pistol, and the other a white handled five or six shooter. The white handled five or six shooting pistol was in a box in the house at the time of the killing. Witness put it in the box a few days before, and took it out a few days after the killing. At this point the State closed.

W. S. Gilbert was the first witness sworn for the defense. He testified that he remembered the occasion of the killing of Mack Gill. There was a "show" performance in town that night, and a great many people were in town. Witness was then deputy sheriff of Wise county. About ten or eleven that night, at the request of sheriff T. R. Allen, witness went with him to the bawdy house in the north part of town. They went to the bawdy house because they saw a party who had been assaulted there or near there, and considerably bruised up, and because they heard the discharge of fire arms in that neighborhood. Witness and the sheriff found a crowd of ten or fifteen men gathered at the bawdy house. The sheriff and witness remained some time at the bawdy house, and then left. Witness saw Ed. Johnson at the west end of the cross street that runs between the houses of Gill and Beville. Sheriff Allen, Bunk Allen, deputy marshal, and witness passed through the said cross street, turned north and went east of Gill's house, and then turned west and stopped at a corner of the fence a little east of Mr.

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Gill's house. After standing there some little time, sheriff Allen told witness that he was cold and was going back to town, but for witness and Bunk Allen to remain, and to arrest any party who should discharge a pistol or create other disturbance, or at all events to identify any person or persons who might so offend.

Witness and Bunk Allen remained concealed in the corner of the fence until they got cold, when they went to the bawdy house to warm. City marshal Cartwright, the defendant, was in the bawdy house when witness and Bunk Allen got there. In a short space of time Dave Bailey, the Moore boys and others ran into the bawdy house. Bailey told Cartwright that if he had any officers in the house he wanted him to send them with him for protection; that horse thieves had knocked him down and taken his horse, and he wanted the help of officers to recover his horse. Bailey had blood on his face, nose and hands. Bailey said he would show the officers where to find the horse thieves. The defendant, as city marshal, Ed. Johnson, Bunk Allen and witness started with Bailey. Several others followed. The barn where the assaulting parties were said to be was but a few steps distant from the bawdy house. As the party approached the barn, the witness remarked to them: "Go slow, boys." Defendant was then a little to one side of witness. When near the party, one of them, calling defendant by name, said: "What are you doing here?" At the same time one of them either knocked or shoved the defendant down. Defendant fell backwards to his knees. Just as the defendant fell, some one who stood behind the man who shoved the defendant down fired two shots at defendant. The flashes from these shots were directly toward the defendant. These two shots were fired from a gun.

These shots from the gun were followed by one or two shots from a weapon (a pistol the witness thought) in the hands of the man who knocked the defendant down. They were fired at the defendant. The firing became general on both sides after the first two shots. The defendant fired one shot while he was down, that the witness knew of. He could not say whether the shot he saw defendant fire was fired before or after the deceased fell. Witness did not fire a single shot at the deceased, but did shoot at Tom Gill, after Tom shot at him. After the deceased fell, Tom Gill went into the lot, going through the gate on the north side. Witness went down to the southwest corner of the lot, when Tom Gill, from the inside of the lot, reopened fire on him. Witness fired several shots at Tom Gill from the south-

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west corner of the barn. Witness then saw Tom Gill working at the lever of his gun, and called to him to throw down his gun. Tom replied that it was no use; that he was out of cartridges, but would go to the house and get more. Witness then called to the party to desist, and shoot no more. Witness did this because he thought Tom's gun was disabled and he could be readily arrested. The witness did not think that any shots were fired after this. Witness then went up to the body of the dead man and found it to be the body of Mack Gill. Up to this time the witness did not know who the opposing parties were, but supposed them to be horse thieves. Witness then told the parties with him to stay with the body while he went to town to notify the sheriff, and in the meantime to allow no one to touch the body. Bunk Allen went with witness as far as the southwest corner of the square. Witness got the sheriff and returned to the body. Witness saw none of the party with him have their pistols out until the defendant was knocked down.

Sheriff T. R. Allen was the next witness sworn for the defense. He gave the same account of his movements on the night of the killing, so far as they had any connection with the homicide, as that given by the witness Gilbert. He stated, in addition, that when he went to the bawdy house with Gilbert and Bunk Allen, he found the defendant there, who told him that he heard the first shooting at the house, and had come there to see about it. Just as witness left the house, defendant said that it was twelve o'clock, and, as it was Saturday night, he would go up town and close the saloons. When Gilbert called the witness to tell him of the killing, the witness was in bed. When witness got to the body with Gilbert, he found Bunk Allen and Ed. Johnson there. Bunk Allen and witness were not relatives.

James Gose was the next witness qualified for the defense. He testified that he was at the bawdy house at the time of the killing. Dave Bailey, the two Moore boys, and Alex. Bainbridge went out to hunt Bailey's horse. In a short time they returned, saying that horse thieves had knocked Bailey down and taken his horse. Bailey's face was bloody. Defendant, Bunk Allen and Ed. Johnson started out, followed by several others. Witness took up his position on the southeast corner of the house, and saw the parties. When the defendant and his party got to where the other party were, some one of the reputed horse thieves knocked the defendant down with a gun or stick, and fired two shots at him while down. The firing then became gen-

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eral. The witness saw the man who knocked the defendant down, fall.

Joseph Moore was next introduced by the defense. He testified that from the "show" he went to the bawdy house, near Gill's place. He went there with Dave Bailey, Jeff. Moore and Alex. Bainbridge. Bailey missed his horse after being there some little time, and the four parties named went together to hunt for him. They soon found the horse standing near a fence a little east of Gill's barn. When the parties stepped up to get him, they saw three parties, one with a gun, standing in the barn lot. The men cursed the witness's party and asked: "What in the h—ll are you doing here this time of night?" Witness took hold of the bridle on the horse, when one of them called out: "Shoot the d—d rascal," and rushed out of the yard. Another of the party in the lot said: "No, boys, you are wrong; it is their horse." Some one of their party rushed on witness and struck him, then struck Jeff. Moore, and as witness started back to the bawdy house he heard them pommeling Dave Bailey. Witness looked back and saw Bailey coming, and saw blood on his nose. Witness, Jeff. Moore, Bailey and Bainbridge went on to the bawdy house and told the defendant that some horse thieves had attacked them, knocked Bailey down, and taken his horse; and they demanded the protection and assistance of the officers to recover the horse.

The witness and others followed the officers when they went to the place of assault near the barn. When the party reached the ground one of the supposed horse thieves struck the defendant an overhanded blow and felled him, and then shot at him, the witness thought with a pistol, though he did not see the weapon. He, however, did see the flash as it left that man's hand extended toward the defendant. Witness saw nothing in the hands of the man who knocked the defendant down, and did not know what he knocked defendant down with. The witness saw another man, who was with the deceased, shoot. After the first two shots, the firing became general. Witness thought some six or eight shots were fired before the deceased fell. After the deceased fell Tom Gill got over the fence into the lot and fired several shots with his gun. Witness then saw him, Tom Gill, working at the lever of his gun, evidently trying to place in it a cartridge. Some one of the officers called to him to throw down his gun. He replied: "It is no use; my gun won't shoot." The officer then called: "Hold up," and the shooting ceased.

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The officers' party, including the witness, went back to the bawdy house, and the defendant remained there, going nowhere until sheriff Allen, for whom Gilbert went, arrived. Witness, Jeff. Moore, Bainbridge and Bailey, had all drunk some that night, but were not drunk. They had a quart and a pint bottle of whisky with them. The witness saw none of the officers with drawn pistols until after the defendant was knocked down.

Charles Wallace testified, for the defense, that after the "show" on the night of the killing he saw the deceased take four or five drinks of whisky, and knew him to be under its influence, but could not say that he was drunk. At about ten or eleven o'clock on that night, Frank Hardwicke, John Russell, deceased and witness left the saloon together and went to the bawdy house. After remaining there a short while they left together, to return to the saloon—witness and Russell together in front, Hardwicke and deceased behind. Witness heard a pistol fired behind him, but did not see who fired it. Immediately after it was fired deceased said that he was sorry he fired his pistol, as he was afraid it would involve the party in trouble. Witness saw no pistol. The party went to the saloon, where the witness last saw the deceased about eleven o'clock.

Frank Hardwicke testified that he was with deceased, Russell and Wallace, *en route* from the bawdy house to the saloon, on the occasion spoken of by Wallace, and saw the deceased discharge a pistol. He did not see the pistol, and did not want to. He did see the flash and heard the report. He heard the deceased say that he was sorry he discharged it, as it might result in trouble. Russell testified to the same facts.

Mike Chambliss, for the defense, testified that on the night of the killing, soon after dark, the deceased had a black handled five or six shooting pistol on his person. He handed that pistol to witness, who put it behind the bar in the saloon until deceased should finish a game of pool in which he was engaged. Witness gave it back to deceased when he started to the show. The pistol was too large and too long to be carried in the vest pocket. The deceased took several drinks in the saloon, but was not to say drunk.

C. D. Cates testified that he was one of the coroner's jury that sat in the inquest over the body of deceased. On Sunday morning, the day after the killing, the jury assembled in the room where Tom Gill lay wounded. Tom told some one of the jury

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to look in his coat pocket, where a pistol would be found. The pistol was produced from the coat pocket. It was a small single barreled pistol, and showed upon examination that it had not been discharged for several days. The pistol was loaded, and had dust and dirt in the barrel. Witness also saw a Winchester rifle in the room. The lever was hung and would not work.

J. J. Lang testified substantially to the same facts related by the witness Cates, and, in addition, stated that he examined the barn, and found a plank removed from the west end.

Alex. Bainbridge, the last witness examined, gave a detailed account of the tragedy, in substance the same as that given by Joseph Moore.

The motion for new trial presented the various questions involved in the opinion of the court.

*J. A. Carroll, and Lovejoy, Dickenson & Patterson, and Piner & Smith*, for the appellant.

*J. H. Burts*, Assistant Attorney General, and *W. Poindexter*, for the State.

**WILLSON, JUDGE.** It was proper to permit the prosecution to prove that, a few minutes after the Gills were shot, the defendant and another man were seen at old man Gill's house, and also to prove the language and conduct of the defendant at that time and place. This testimony, as it is presented in the record, was as to matters which transpired directly after the shooting, and closely connected with it, constituting a part of the *res gestæ* thereof. (Whart. Crim. Ev., sec. 262; *Galbriath v. The State*, 41 Texas, 567; *McCall v. The State*, 14 Texas Ct. App., 353.)

The law of principals in crime applies as well to manslaughter as to any other offense. There can be no *accomplice* to manslaughter, but several may act together in committing this offense, as in any other homicide. It was not error, therefore, for the court to instruct the jury that the defendant might be convicted of manslaughter, although he did not himself inflict the wound which caused the death of the deceased. (*Ogle v. The State*, *ante*, p. 361.)

Upon the issue of self-defense the court charged as follows: "The jury are further charged that if the killing was done in the necessary defense of the slayer or any of them, that is, to



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protect himself or themselves from immediate and imminent danger of death or great bodily harm from the violence of the deceased, which was not provoked or sought for by the slayer, and which could not be avoided by any other means except retreating, then it would not be an unlawful killing, but would be justifiable homicide." This was the only charge given upon self-defense. It was excepted to by the defendant at the time as incorrect and insufficient, and the defendant also asked special instructions intended to supply the defects and correct the errors complained of in the court's charge, which requested instructions were refused.

It cannot be questioned that the evidence clearly raised the issue of self-defense. It was therefore essential to a fair and legal trial of the case that the court should fully and correctly instruct the jury upon this issue. This the court failed to do. If the defendant was in immediate and imminent danger of death or great bodily harm from the violence of the deceased, he was not required by law to resort to other means than killing his assailant, to protect himself. In such case the law justifies the assailed party in acting promptly and effectively by at once slaying his adversary. (*Kendall v. The State*, 8 Texas Ct. App., 569; *Ainsworth v. The State*, Id., 532; *King v. The State*, 13 Texas Ct. App., 277.)

Nor does the law limit the right of self-defense, as does this charge, to actual danger of death or serious bodily harm. If the appearances are such as to create in the mind of the slayer a reasonable apprehension of death or serious bodily harm, and he acts under the influence of this apprehension, it is self-defense, although there was in fact no danger of his being killed or of receiving seriously bodily injury. (*Rodriguez v. The State*, 8 Texas Ct. App., 129; *Babb v. The State*, Id., 173.) "In homicide, and in other cases of violent assault, a danger which is apparently imminent is to be viewed, provided the person assailed honestly believes in its reality and imminency, as if it were actually real and imminent." (Whart. Crim. Ev., sec. 60; Whart. on Hom., sec. 606.)

Again, the right of self-defense, by the charge, is restricted to defense against the violence of deceased alone. Under the facts of this case it was error to thus restrict it. There were two other persons present, apparently acting with deceased, one of whom was armed with a gun. If these persons were acting with the deceased in an attack upon the defendant, or if they or either of

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them made an attack upon defendant, deceased being present and acting with them in such manner as to make him a principal in such attack, or if the appearances were such as to cause in the mind of the defendant a reasonable belief, and did cause such belief, that the deceased was a party to the attack upon him, or which was about then to be made upon him, by all or either of said persons, then defendant's right of self-defense would extend to the acts of each and all of the party, because the violence of one of them would be that of all. Thus, if Tom Gill violently assaulted defendant, or was in the act of doing so, and the deceased was present aiding in the said assault or encouraging the same; or if the appearances were such as reasonably to cause defendant to believe, and he did so believe, that deceased was participating, or was about to participate, in such attack, then he would have the same right to defend himself against the deceased that he would have to defend against Tom Gill, although deceased may not have used, or attempted to use, any violence upon him.

Another portion of the court's charge is as follows: "In considering the guilt or innocence of the defendant on trial, the jury are instructed that no act on the part of Tom Gill, or others, would justify or excuse the killing of Mack Gill, unless such other party acted under the advice or under the control of Mack Gill." This portion of the charge was excepted to by the defendant, and is manifestly and materially erroneous. If Tom Gill, or others, used unlawful violence against defendant, the deceased being present at the time, and his conduct and the circumstances of the occasion being such as to cause the defendant reasonably to believe, and he did so believe, that the deceased was acting together with Tom Gill or others in committing the violence, then the defendant would be justifiable in defending himself against each and all of the parties he believed, and reasonably had cause to believe, were engaged in assailing him. It did not require the advice to, or control over, Tom Gill or others to make the deceased a participant in their acts and responsible therefor. If he acted together with them, and, knowing their unlawful intent, aided by acts, or encouraged them by words or gestures in the commission of the violence, or agreed thereto, then he was a principal in the assault upon defendant, and subject to the same rules as if he was the person who actually committed the assault. (Penal Code, Arts. 74-78.)

There are other portions of the charge of the court which

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in our opinion, are not correct when applied to the evidence in this case, but we shall not take time to specify and discuss them. The objectionable portions of the charge were promptly excepted to by the defendant, and special instructions correcting some of the errors of the main charge were requested by the defendant, and refused. In our opinion the jury was not instructed in the law of the case, and for this reason the judgment must be reversed and the cause remanded.

We are called upon by a bill of exceptions to notice another matter which occurred upon the trial. Upon the conclusion of the argument of the counsel who opened the case on the part of the State, the audience, which was composed of some four hundred people, cheered and applauded the speaker. This was late at night and further argument was postponed until the next morning. The court did not reprimand the audience, or in any way express disapprobation of the improper demonstration, nor was the jury cautioned against suffering this conduct of the audience to influence their minds in the consideration of the case. On the next morning, counsel for defendant were permitted in their addresses to the jury to comment upon and condemn without restriction the occurrence of the night before. In reply to them, counsel for the State, in the concluding argument, alluding to the demonstration made by the audience said, "it was a spontaneous outburst of approval by the audience of this cause, after they had heard it truthfully represented by the State." This remark was not reproved by the court, and still the jury were not admonished by the court to disregard this extraneous matter, and to guard themselves against being influenced by it.

It is unnecessary for us to determine whether or not we would suffer this conviction to stand if this bill of exception presented the only ground of reversal. It is enough for us to say now that we think the court should have taken prompt and decisive action on the occasion, and should have endeavored by its condemnation of the proceeding, and its admonitions to the jury, to prevent any prejudice to the defendant by such reprehensible conduct. And in this effort on the part of the court, counsel for the State should have united. As the matter is presented to us by the bill of exception, we cannot say that the defendant has had a fair and impartial trial upon the law and the evidence of the case.

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Syllabus.

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Because of the errors in the charge of the court, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered June 21, 1884.

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[No. 3215.]

JAKE SUTTON v. THE STATE.

1. **THEFT—POSSESSION IN THIS STATE OF PROPERTY STOLEN ON FOREIGN TERRITORY—CHARGE OF THE COURT.**—The doctrine that, in order to justify a conviction for theft committed out of the State, it must be shown, with other requisites, that the party who committed the theft brought the property into this State, or, at least, that he had possession or control over it after it came into this State, is unquestionably supported by the letter of the law. But, if the proof shows that the accused aided in taking the stolen property in another State, furnished the means for its transportation into this State, came to this State himself in pursuance of an agreement to do so, and in this State received his portion of the fruits of the crime, he, in contemplation of law, brought the property into this State, exercised possession and control over it in this State, and was, from its inception, a principal in the crime. See the opinion *in extenso* for a charge announcing the principle, *held* correct.
2. **SAME.**—After their retirement, the jury returned into court and requested further instructions as to whether or not they were authorized to consider facts proved to have transpired in Texas, in determining whether or not the accused was present when the property was stolen in the Chickasaw Nation. The court charged as follows: "In order to determine whether or not the defendant was present at the commission of the alleged offense, the jury are authorized to take into consideration all the facts and circumstances proven in the case in so far as the same have any bearing on the question, without reference to which side of the river (State line) they may have occurred." *Held*, correct.
3. **PRACTICE—EVIDENCE.—BILL OF EXCEPTIONS** reserved to the action of the court in sustaining objections to proposed testimony, which fails to disclose the evidence sought to be elicited, and the grounds urged to it and sustained, is not sufficient to enable this court to determine the relevancy and materiality of the rejected evidence, and hence its exclusion cannot be held error.
4. **SAME—PRIVILEGED COMMUNICATIONS.**—It is a well settled general rule that an attorney cannot be permitted to disclose communications made to him by his client in the course of their professional relations. It is no exception to this rule that the client turned State's evidence against his

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co-defendant and testified for the prosecution; wherefore the trial court properly refused to permit the defendant's counsel to state in evidence communications made to him by the defendant while the relation of attorney and client existed. See the opinion *in extenso* for an elaboration of the principle.

5. **SAME—PRIVILEGE OF ARGUMENT.**—The prosecuting attorney in this case transcended the limit of legitimate argument in closing for the State, but was promptly reprimanded by the court, and the jury fully instructed to disregard his utterances so far as they were unauthorized. In the light of all the circumstances surrounding the case, the defendant's rights do not appear to have been prejudiced by the abuse of privilege. *Held*, that, under such circumstances, the conviction will not be disturbed.
6. **THEFT—FACT CASE.**—See the opinion for a state of proof *held* sufficient to corroborate an accomplice witness, and to support a conviction for theft of a mule.

**APPEAL** from the District Court of Grayson. Tried below before the Hon. R. Maltbie.

The conviction was for the theft of a mule, the property of Isaac Cole, and the penalty imposed was a term of five years in the penitentiary.

The opinion summarises the inculpatory evidence sufficiently to convey a clear understanding of the rulings.

The motion for new trial raised the questions involved in the opinion.

*Hare & Head*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** The State's witness Mann testified, in substance, that he and the defendant agreed together to steal Isaac Cole's mule, and that, in pursuance of this agreement, they stole the mule in the Chickasaw Nation; that it was agreed between them that he should bring the mule into this State and sell it, and meet the defendant at Pottsboro, in Grayson county, and there divide with him the proceeds of the theft; that the defendant furnished him with a bridle and saddle to put on the mule, and fifty cents in money to pay ferriage at the river; that he, the witness, brought the mule to Grayson county, swapped it for a horse, then sold the horse, and met the defendant at Pottsboro according to appointment, and divided proceeds with him according to their previous agreement. The defendant was not with the witness when he, the witness, brought the mule

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into this State, nor did the defendant ever have possession of or control over the said mule after it was brought into this State.

Upon this state of facts, the court charged the jury as follows: "In order to convict the defendant you must believe that he was personally present at the time and place when and where the mule was taken from the possession of said Cole, and you must believe that he aided and abetted in the same, and you must further believe that the said Sutton brought said mule into Grayson county, Texas. But, if you believe that the said Sutton and Mann stole the said mule under the circumstances enumerated above, and that it was agreed at or before the time that the said Sutton would furnish the said Mann the means to bring the said mule into Grayson county, Texas, and that he did so, and that it was further agreed between them that said Mann should bring said mule into Grayson county, Texas, and sell it, and you believe from the evidence it was then agreed that the said Sutton would meet the said Mann in the said Grayson county, Texas, and that they would divide the proceeds of the sale of the said mule; and further, that in pursuance of the said agreement the said Mann brought the mule into Grayson county and sold it, or first swapped it, and sold the animal he received in exchange, and that the said Sutton met the said Mann in Grayson county, Texas, in pursuance of said agreement, and that they divided the proceeds arising from the said sale between them, this would constitute a sufficient bringing of said mule into Grayson county, on the part of the said Sutton."

It is insisted by the defendant's counsel that the foregoing charge is erroneous. Their position is that "to justify a conviction for theft committed out of this State, it must be shown (with other requisites) that the party who committed the theft brought the property into this State, or, at least, that he had possession or control over it after it came into this State." This position is unquestionably supported by the letter of the law. (Penal Code, Arts. 798 and 799; *Carter v. The State*, 37 Texas, 362.) But does not the spirit and purpose of the law reach further? If the defendant not only aided in taking the mule, but furnished the means of bringing him into this State, and then came here himself in pursuance of an agreement to do so, and here received his portion of the fruits of the crime, did he not, within the meaning of the law, bring the property into this State? Was he not, in the eyes of the law, a principal in the theft, from its inception to its final consummation? Was not the possession and

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control over the property in this State by Mann the possession and control also of the defendant, that possession and control being in pursuance and in furtherance of the common design of both? We are of the opinion that the learned judge expressed the correct view of the law applicable to the evidence in this case, in the charge we have quoted. We think this view is supported by both reason and authority. (*Welsh v. The State*, 3 Texas Ct. App., 413; *Heard v. The State*, 9 Texas Ct. App., 1; *Wells v. The State*, 4 Texas Ct. App., 20; *Berry v. The State*, 4 Texas Ct. App., 492; *Scales v. The State*, 7 Texas Ct. App., 361; *O'Neal v. The State*, 14 Texas Ct. App., 582; *Cox v. The State*, Id., 96.)

During the time the jury were deliberating upon the case, they came into court and requested of the court further instructions as to whether they had the right to consider the facts which were proven to have transpired in Texas in determining whether the defendant was present when the mule was stolen in the Chickasaw Nation. In response to this inquiry the court instructed them as follows: "In order to determine whether or not Jake Sutton was present at the time of the commission of the alleged offense, the jury are authorized to take into consideration all the facts and circumstances proven in the case, in so far as the same have any bearing on the question, without reference to which side of the river they may have occurred."

We see no valid objection to this instruction. It merely directed the jury to look to and consider all the evidence in the case bearing upon the point inquired about. If facts were in evidence which transpired on the Texas side of the river, and which tended to prove that the defendant took part in the theft of the mule on the other side of the river, certainly such facts are proper to be considered in determining the defendant's participation in the theft. We fail to perceive any force in the objections made to this charge. Of course this charge was intended by the court to be considered by the jury in connection with the main charge previously delivered to them, and we must presume that it was so considered by the jury. The special instruction requested by the defendant's counsel, and refused by the court, was not in response to the question propounded by the jury, and, furthermore, was not, in our opinion, correct in principle.

The defendant's bills of exception numbers one, two and four, were taken to evidence admitted over his objections, which evi-

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dence related to occurrences which transpired in Texas, and after the theft of the mule in the Chickasaw Nation, upon the ground that it was not shown that the defendant had possession of or control over the mule after it was brought into this State. We think the evidence was admissible. As before stated, we think the defendant could be guilty of the theft in this State, although he may not have had the actual possession or control over the mule in this State.

On cross-examination of the witness Mann, the defendant asked him if he, the witness, had not been a witness at Fort Smith, in a case on a charge of theft, against a party, and what kind of property it was, and if it was not his mother's property, and if he did not assist in stealing it, and if he did not turn State's evidence, and have them to convict the man. Upon objection made by the State the witness was not permitted to answer these questions. We are not informed by the bill of exceptions what were the facts intended to be elicited by these questions, nor the particular objections made by the State. We cannot determine from this bill of exceptions the relevancy and materiality of the testimony sought to be elicited, and therefore we cannot hold that the court erred in its ruling. (*Davis v. The State*, 14 Texas Ct. App., 645.)

The defendant's sixth and eleventh bills of exception are likewise too imperfect to enable us to determine the relevancy and the materiality of the evidence that was rejected. It is not shown in the bills what the testimony was which the questions sought to develop.

The defendant's eighth bill of exceptions is to the rejection of testimony by him to prove that the witness Mann, while confined in jail on the charge of this same theft, had stated to his counsel repeatedly that the defendant Sutton had nothing to do with the theft of the mule, but that he, the witness, was alone guilty of the theft. This testimony was objected to by the State, and was rejected by the court upon the ground that said statements having been made by the witness to his attorneys, the same were privileged communications, and were therefore not admissible in evidence. It is a well settled general rule that a lawyer is not permitted to disclose communications made to him by his client in the course of their professional relations. (Whart. Crim. Ev., sec. 496; Roscoe's Crim. Ev., sec. 150; 1 Whart. Ev., sec. 576; 1 Greenl. Ev., sec. 237 *et seq.*) But it is contended by the counsel for the defendant that the case before us does not come



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within the general rule; that the witness Mann being an accomplice in the crime, and having turned State's evidence, is not entitled to the benefit of this rule. In support of this position, we are cited to the case of *Alderman v. The People*, 4 Michigan, 414. In that case an accomplice testifying in behalf of the State was held to be compelled to disclose certain communications which he had made to his attorney, and which communications under the general rule were privileged. The court in that case said: "We think an accomplice who makes himself a witness for the people should be required to give a full and complete statement of all that he and his associates may have done or said, relative to the crime charged, no matter when or where done, or to whom said. He should be allowed no privileged communications. These he has voluntarily surrendered. The enforcement of such a rule may be the only protection the party on trial has left; the only means remaining to him to meet, it may be, the perjury of the criminal upon the witness stand." We are not prepared to follow the doctrine of this case. While its reasoning is quite plausible, still it has been the long settled rule of the law, founded upon the ground of public policy, that communications made by a client to his attorney, in the course of their relations as such, and with respect to the business about which the attorney had been employed by the client, should not be disclosed. This rule has been most rigidly, and with great unanimity, adhered to by the courts, and the tendency has been to contract rather than relax it. We hold that the objection to the proposed testimony was properly sustained.

The remarks of counsel for the State in the concluding argument of the case, and set forth in the defendant's ninth bill of exceptions, were improper, and not within the rules governing argument. The court very promptly checked the counsel, and reprimanded him for this violation of the rule, and instructed the jury to disregard the objectionable remarks. If, upon a consideration of the whole case, it appeared to us that this conduct of counsel had influenced the minds of the jury to the defendant's prejudice, we would not hesitate, upon this ground alone, to reverse the judgment. But, considering the prompt and commendable action of the learned judge on the occasion, in connection with the facts of the case, we do not believe that the remarks objected to could reasonably or probably have had any effect upon the jury prejudicial to the defendant.

It is insisted by the counsel for the defendant that this convic-

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tion is not supported by the evidence; that it is based upon the testimony of an accomplice alone, and that this testimony is uncorroborated in the manner and to the extent required by law. Is the testimony of the accomplice Mann corroborated by other evidence tending to connect the defendant with the offense committed? Mann testified that on the night of July 11 he left the defendant's house with the mule, and with the defendant's bridle and saddle, which the defendant had given him to use in riding the mule, and that he brought the mule into Grayson county, exchanged it for a pony, sold the pony at Whitesboro, and from there went to Pottsboro on the train, where he met the defendant, and they went from there to Denison together on the train. He further stated that the defendant was to leave home on the next day after the theft, and was to meet witness in Pottsboro, Grayson county, and that the defendant did meet him there on the day agreed upon, and had with him a horse without a saddle. It was proved by other evidence than that of the accomplice that, on the day Mann said he and the defendant met at Pottsboro, they were seen there together; that Mann brought with him on the train and delivered to the defendant a saddle and bridle, and that defendant had rode to Pottsboro on that day on a horse without a saddle; that they went from Pottsboro to Denison and returned together. On the day after the theft the defendant was seen to leave his home in the Chickasaw Nation, riding bare back, saying he was going to Pottsboro.

Does this corroborating evidence tend to connect the defendant with the theft of the mule? We think it does. Unquestionably his saddle and bridle were used by Mann in conveying the mule into Grayson county. The defendant parted with his saddle and bridle on the very day the mule was stolen, and on the next day thereafter he rode his horse bare back to Pottsboro, where he received from the witness Mann the saddle and bridle. Mann had no animal of his own to ride, and this fact was known to defendant. All the circumstances in evidence, omitting the testimony of the accomplice, tend to prove that the defendant knew where Mann had gone to, and the purpose of his going, and that he, the defendant, went to Pottsboro to meet Mann, expecting Mann to be there with the saddle and bridle. Whilst this corroborative evidence is not as full and cogent as is desirable in such cases, still, in our opinion, it fills the measure of the law, and must be held sufficient to uphold the verdict of the jury.

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We have found no error for which this judgment should be set aside, and it is therefore affirmed.

*Affirmed.*

Opinion delivered June 21, 1884.

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[No. 2981.]

ANNIE WILSON v. THE STATE.

1. **DISORDERLY HOUSE—FORMER ACQUITTAL.—**CHARGE OF THE COURT properly instructed the jury that a former acquittal upon a charge of vagrancy cannot prevail as a plea in bar of a prosecution for keeping a disorderly house.
2. **SAME.—**Courts do not take judicial cognizance of special laws, and a charge of the trial court, in assuming the existence of a city ordinance requiring all penal ordinances to be published ten days before their enforcement, was error.
3. **SAME.—**But if such an ordinance was shown to have existed, the defendant, in order to invoke its protection, would not be required to assume the burden of proving its publication. The presumption that it was legally published would obtain, and the burden of proving its non-publication would rest on the adverse party. In charging the converse of this rule the court erred. See the opinion on the question.
4. **SAME—FACT CASE —**See evidence *held* sufficient to sustain the plea of former acquittal.

**APPEAL** from the County Court of Dallas. Tried below before the Hon. R. E. Burke, County Judge.

The conviction was for keeping a disorderly house in the city of Dallas, and the punishment imposed was a fine of one hundred dollars.

City policeman John Overand was the first witness introduced by the State. He testified that he knew the defendant. She kept a disorderly house in the city of Dallas, Texas, from April 5, 1883, until May 25, 1883. The general reputation of that house was that it was a house of public prostitution. The inmates of the house were reputed to be common prostitutes. Several women, inmates of that house, were fined as common prostitutes during the months of April and May.

Cross-examined, the witness stated that he was a witness in the mayor's court against the defendant when she was tried in

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Statement of the case.

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that court, and acquitted, on the charge of vagrancy. That trial and acquittal were had on May 2, 1883. The testimony of the witness on that trial was in substance and effect the same as that given on this trial, and related to and covered the same period of time. The witness was also a witness against the defendant when she was, on the third day of July, 1883, tried before the mayor's court, and acquitted, upon the charge of unlawfully keeping a disorderly house. The testimony given by the witness on that trial was the same in substance and effect as that given on this trial, and covered and referred to the same period of time.

The testimony of Pat Sheehan, W. B. Maddox, W. H. Ramsay and Pat Mullen, witnesses for the State, was the same in substance and effect as that of the witness Overand.

The defendant then introduced the following evidence:

"Complaint filed in mayor's court of the city of Dallas, on the twenty-first day of May, 1883, and the verdict of the jury thereon, which complaint and verdict read as follows:

"In Mayor's Court, City of Dallas:

"THE STATE OF TEXAS, }

"COUNTY OF DALLAS. }

"Personally appeared before me, W. L. Cabell, Mayor of the City of Dallas, Pat Mullen, of lawful age, who, after being duly sworn, deposes and says that Annie Wilson, in the city of Dallas and State of Texas, on the twenty-first day of May, A. D. 1883, was unlawfully a vagrant by being then and there a common prostitute, contrary to the form of section 2 of an ordinance of said city, passed by the city council on the seventeenth day of March, 1881, and against the peace and good order of the city of Dallas.

"PAT MULLEN.

"Sworn to and subscribed before me this twenty-first day of May, A. D. 1883.

"W. L. CABELL, Mayor."

"We, the jury, find the defendant not guilty.

"V. F. PACE, Foreman."

The judgment of the said mayor's court on said verdict was as follows:

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Statement of the case.

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" May 23, 1883.

"CITY OF DALLAS }  
"V. }  
"ANNIE WILSON. }  
"VAGRANCY. }

"This cause continued till May 28, 1883,  
and jury called for by defendant."

" May 28, 1883.

"This case called for trial. Thereupon came the defendant and called for a jury. Thereupon a jury was impaneled and sworn. After hearing the evidence the jury returned their verdict 'not guilty.' Defendant discharged."

The defense then read in evidence the ordinance of the city of Dallas defining and punishing vagrancy as follows:

"An Ordinance defining and punishing vagrancy.

"SECTION 1. Every vagrant found in the city of Dallas shall, upon conviction, be fined in any sum not exceeding ten dollars.

"SECTION 2. The following persons are vagrants within the meaning of the preceeding section: \* \* \*

"4. \* \* A common prostitute. \* \* \*

"SECTION 4. That this ordinance take effect from passage and publication.

"Approved March 17, 1881.

"JOHN J. GOOD, Mayor.

"Attest: J. B. HEREFORD, Secretary."

The defense then introduced in evidence the following complaint, filed in the mayor's court of the city of Dallas, on the twenty-seventh day of June, 1883, with the verdict on the same:

"In the Mayor's Court, City of Dallas·

"THE STATE OF TEXAS, }  
"COUNTY OF DALLAS." }

"Personally appeared before me, W. L. Cabell, mayor of the city of Dallas, J. P. Keehan, of lawful age, who, after being duly sworn, deposes and says that Annie Wilson, in the city of Dallas, and State of Texas, on the 27 day of June, A. D. 1883, did unlawfully keep a disorderly house, the same being then and there kept by her for the purpose of public prostitution, and as a common resort for prostitutes and vagabonds, contrary to the form of section 1 of an ordinance of said city, passed by the city

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council upon the 13th day of June, A. D. 1883, and against the peace and good order of the city of Dallas.

"J. P. KEEHAN.

"Sworn to and subscribed before me this the 27th day of June, A. D. 1883."

"W. L. CABELL, Mayor."

"We the jury, find the defendant not guilty.

"GEO. S. FUQUA, Foreman.

"July 3d, 1883."

The following judgment on said verdict was then read in evidence by the defendant:

"JUNE 28TH, 1883.

"CITY OF DALLAS,

v.

"ANNIE WILSON.

"KEEPING DISORDERLY HOUSE.

} Continued till June 30th, 1883.

} June 30th, 1883. Continued till  
July 3, by consent.

"July 3, 1883. This case being called for trial, thereupon came the defendant and plead 'not guilty.' Special plea, former trial on the 19th of April in the county court. Plea *lis pendens*, that two suits were pending in the county court when this suit was brought. Prosecuting attorney's return on demurrer to plea of former trial on the 19th of April. Answer to plea of former trial on 28th of May. Petition moved to change the date of filing complaint from 13th to 27th. Motion sustained, change made. Demurrer sustained to special plea of former trial April 19th, in the county court, and to the special plea of former trial on the 28th day of May, 1883, and also to plea of *lis pendens*. The jury returned a verdict of 'not guilty,' and the defendant was discharged. \* \* \*

"W. L. CABELL, Mayor.

"Attest: J. T. CARTER, Act'g Clerk."

The defense then read in evidence an ordinance passed by the city council of the city of Dallas, on the thirteenth day of June, 1883, entitled, "An ordinance defining disorderly houses, and punishing the keepers of the same," approved June 13, 1883; also sections 2, 21, 7 and 62 of the amended charter of the city of Dallas, entitled, "An Act amendatory of an act approved August 9, 1876, entitled 'an act to incorporate the city of Dallas, and grant a new charter to said city,' approved March 3, 1883."

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Opinion of the court.

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The motion for new trial raised the questions discussed in the opinion

*R. H. West*, filed an able brief and argument for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

HURT, JUDGE. The appellant, Annie Wilson, was indicted in Dallas county, Texas, for keeping a disorderly house, which indictment was filed in the county court of said county, on the twenty-sixth day of May, A. D. 1883.

In answer to the indictment, appellant, in addition to the plea of not guilty, pleaded former acquittal in the mayor's court of the city of Dallas, on two separate occasions, to wit: July 3, 1883, and May 28, 1883. On the trial, the jury under the instructions of the court found appellant's pleas of former acquittal untrue, and found her guilty as charged, and assessed her punishment at a fine of one hundred dollars.

Upon the trial the court charged the jury as follows: "Under the defendant's plea of former acquittal of this offense, in the mayor's court of the city of Dallas, under complaint filed May 21, 1883, you are instructed that the same was for vagrancy, and cannot be pleaded by the defendant in bar of the prosecution in this case for keeping a disorderly house. Under the other plea of former acquittal filed by the defendant, charging by affidavit filed in the mayor's court of the city of Dallas, on the twenty-seventh day of June, 1883, that she was the keeper of a disorderly house, as defined by section one of an ordinance of said city, passed on the thirteenth day of June, 1883, you are instructed that, under the charter of the city of Dallas, all ordinances which impose a penalty for their infraction must be published at least ten days before the same can be enforced, and it is incumbent on the defendant to show that the ordinance under which she was acquitted was published the requisite number of days, and in case she has failed to do so, then the plea can not be considered by you as a bar to this prosecution, and you will say in your verdict that you find the defendant's plea to be untrue."

That part of the above charge relating to vagrancy is correct. But that which relates to former acquittal for keeping a disorderly house is erroneous in two particulars.

1. It assumes the existence of a city ordinance requiring all penal ordinances to be published ten days before their enforce-

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Syllabus.

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ment. In this the court erred. Courts do not take judicial cognizance of special acts or laws.

2. Concede that such an ordinance had been introduced in evidence (which was not done), would defendant have been required to prove that the ordinance relating to keeping a disorderly house was published ten days before it could be enforced? Most evidently not. The presumption is that this ordinance had been published the requisite number of days, and it devolved upon the party whose rights were antagonized thereby to show that the ordinance had not been thus published.

Suppose an ordinance be enacted on the first day of June, 1884, and twenty years thereafter the city authorities prosecute a party for its violation, must the city prove its publication? Must this be done in all prosecutions? If so, in a great many instances the city would probably fail to make such proof. In these two respects the charge of the learned judge was erroneous, and very fatal to the plea of former acquittal.

Was the plea of former acquittal sustained by the proof? We are of the opinion that it was. However, the proof of that plea may have been as full, complete, and overwhelming as it is possible for evidence to make it, and still the jury could not have found it true under the charge of the court relating thereto.

For the errors in the charge the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 21, 1884.

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[No. 8071.]

GEORGE RODDY v. THE STATE.

1. PRACTICE—COMPULSORY PROCESS FOR WITNESSES—STATUTORY REPEAL.—Section 10 of the Bill of Rights guarantees to any one accused of crime compulsory process to procure witnesses in his favor, but this right is regulated by Articles 488 and 489 of the Code of Criminal Procedure. Article 489 of that Code provides as follows: "Where a witness resides out of the county in which the prosecution is pending, the defendant shall be entitled, on application, either in term time or in vacation, to the proper clerk or magistrate, to have an attachment issued to compe



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the attendance of such witness. Such application shall be in writing and under oath, shall state the name of the witness and the county of his residence, and that his testimony is material to the defense." It is contended by the State that the effect of the act of April 23, 1883, entitled "An act to provide for the payment of attached witnesses in felony cases," is to so far repeal or modify Article 489 as to commit the matter to the sound discretion of the court when the application is made in term time. *Held*, that the position is untenable; that, tested as it must be by the title, the purpose of the said act of April 23, 1883, was simply to regulate compensation of attached witnesses in felony cases, and it in no way effected the repeal or modification of the Article 489 of the Code of Criminal Procedure.

2. **SAME—RULE OF STATUTORY CONSTRUCTION.**—It is a constitutional provision that the subject matter of a legislative act shall be expressed in the title. The effect of this provision is to nullify any part of a legislative act not expressed in the title.
3. **SAME—PRACTICE.**—Applications for attachments for absent witnesses are not subject to judicial discretion, as provided with regard to applications for continuance. The materiality and probable truth of the testimony expected to be secured from the witnesses named in the application for attachment are not to be determined, on the motion for new trial, in the light of the evidence adduced on the trial. See the opinion *in extenso* on the subject.

**APPEAL** from the District Court of Bexar. Tried below before the Hon. G. H. Noonan.

The conviction in this case was for the theft of sixty dollars, the property of James Sullivan, in Bexar county, Texas, on the thirteenth day of February, 1883. The punishment awarded was a term of five years in the penitentiary.

James Sullivan was the first witness for the State. He testified that about ten or eleven o'clock on the morning of February 13, 1883, he went into Major Lerick's saloon, on the Alamo plaza, in the city of San Antonio. He met several gentlemen in the saloon, and they took several drinks together. The party took seats in the room west of the bar room. Witness called for drinks for the crowd. Having drank, the party talked together for some time, and the witness called for a second round. When these last drinks were served the bar keeper demanded pay for the drinks served. Defendant told him that he need not be in such a hurry for his pay. The bar keeper repeated his demand, saying that he had to wait on customers, and had no time to fool. Witness thereupon took his purse from his pocket. The bar keeper took the purse from witness's hand, opened it, and

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turned it upside down on the table. Two five dollar gold pieces rolled out. One of these the bar keeper replaced in the pocket book, which he handed back to the witness, and the witness replaced it in his pocket. The bar keeper took the other gold piece to the bar, deducted the price of the drinks, and returned to the witness the change in silver, which the witness put in his coat pocket—not the pocket in which he had put his purse. His coat was an ordinary sack coat, with a pocket on each side. When returned to his pocket the purse contained a five dollar gold piece, one ten and nine five dollar greenback bills—in all, sixty dollars. The party remained about the saloon, drinking and talking, until the afternoon. When the party dispersed, the witness walked to the water closet in the back yard of the saloon. Defendant followed, and while the witness was standing in the closet urinating, the defendant came up to his back, ran his hand into witness's pocket and filched the purse and money. Witness turned and told him to let that money alone, that it was his, witness's. Witness owned the money, and defendant took it without his consent. No one was in the back yard at the time but witness and defendant. When he went back into the saloon witness told the parties present that he had been robbed.

Cross-examined, the witness said that he was not the only man in the bar room that day. The defendant and another man were sitting at the table with the witness. Witness saw two soldiers about the bar room, but did not accuse them of the theft, because he knew they did not commit it. The defendant and others were in the saloon when the witness went there. Quite a number of people passed in and out of the bar room while the witness sat there. Witness was drinking, but was not drunk. Witness did not tell the bar keeper who got his money, as he and defendant appeared to be good friends, and witness had no friend present. The witness did not state before justice Adam, on the preliminary examination of the case, that he did not know who got his money. A man who looked very much like the defendant—shaved and dressed like him—sat by the defendant during that trial, and witness was asked which of the two took his money. Witness sat at some distance from the two men, was suffering from cold settled in his eyes, and answered that he could not tell which of the two robbed him at that distance. The counsel for the defendant then (on the examining trial) came near the witness and asked him if the man

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who stole the money did not have a mustache about the color of his, the counsel's, mustache. Witness replied that the mustache of the man who stole the money was not so red. Witness was sworn on the examining trial. He could not say whether or not the signature now exhibited was his. He could not write, and he signed documents with a mark. The signature exhibited was with a mark, but witness did not know whether or not he made it. The witness received the nine five dollar bills described on the evening before, for work he had done for the railroad (the Sunset) as a rock mason. Witness could not find Captain Hughes, the detective, that evening, but complained to him next day about being robbed. He could not give Captain Hughes the man's name, for he did not know it. Hughes told him to go to Adam and make complaint. Adam refused to allow the complaint, because witness could not give the defendant's name, but sent an officer with witness to make the arrest if witness identified the man. The bar keeper had refused to give the witness the defendant's name. They found the man—the defendant. Witness pointed him out, and the officer arrested him. Witness was not mistaken. The defendant is the identical man who took the money. While witness and defendant were sitting in the side room, a great many customers passed into the bar room and out, but very few came into the side room. When the witness was paid the nine five dollar bills on the evening before the theft by the railroad officials, he had a twenty dollar gold piece and the ten dollar bill.

Captain T. J. Hughes testified that he was first assistant city marshal, and his special duty was to hunt up stolen property. On the morning of February 14, 1883, J. Sullivan came to his office and reported that he had been robbed the evening before in Major Lerick's saloon. He described the money lost exactly as he described it on this trial, and said that he did not know the name of the man who took it, but would know him if he were to see him. Witness sent officer Abby with Sullivan to Mr. Adam's office to file complaint, and went himself to a barber shop near. While he was being shaved, Abby brought the defendant Roddy to witness and said that he arrested him on Sullivan's identification. Witness told him to take Roddy to his office and wait until he got there. When witness got back to his office Roddy told him that he had no money. Proceeding to search him, witness found on his person four dollars and a half in silver and nine five dollar greenback bills. Witness then sent

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Roddy to jail, and Sullivan went to Adam's to make complaint.

Cross-examined, the witness said that the arrest was made on the morning of the day after Sullivan claimed to have been robbed. Witness searched the defendant in the presence of Sullivan and Charles Abby. As soon as witness discovered the nine five dollar bills Sullivan claimed them. When Sullivan first complained to the witness he described the man who robbed him, as well as the money lost. Witness did not find a five dollar gold piece and a ten dollar bill on the defendant. The defendant's general appearance answered well to the description of the man as given by Sullivan. At this point the State rested.

Henry Delespin was the first witness for the defendant. He testified that he knew Sullivan and Roddy, and saw them both at Major Lerick's saloon on the thirteenth day of February, 1883. He had known the defendant for eight or nine years, during which time defendant's reputation for honesty was good. Witness was bar keeper at Lerick's saloon. Sullivan came into that saloon a little before noon on the day in question, and remained there drinking until late in the afternoon. He and others sat together in a back room. Sullivan called for drinks, which witness took to the table and demanded payment. Sullivan put his hand in his pocket, and was so slow that witness became impatient and told him he must go and attend to the customers and had no time to fool with him. He, witness, then took Sullivan's purse, which he had drawn out, and shook two five dollar gold pieces out of it. Witness put one of them back into the purse, took his pay out of the other, and returned Sullivan the change. Witness then went back to his place behind the bar to attend to customers constantly coming in. Later in the evening the defendant came to witness and said: "Henry, I saw that soldier taking that change you gave that old man from his pocket." A while after this the witness saw Sullivan go into the back yard. He came back presently and said that he had been robbed. Witness immediately went and searched the soldier, and found a dollar and a half in silver on him, which he said Sullivan gave him. Sullivan denied it. Witness then searched Sullivan, and found that the pocket book was gone. Sullivan said that the soldier took it. The soldier searched—the other one was drunk and asleep—first said that the defendant gave him a dollar; then two, and then three dollars. Both soldiers were in the yard while Sullivan was out there. No one else was out there. When Major Lerick came witness informed him, and he sent for a po-

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Statement of the case.

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lice officer. Policeman Abby soon came, searched the soldiers, and found a dollar or so on one, and arrested one for being asleep and drunk. The other went to his quarters.

Cross-examined, the witness said that the two soldiers were at the saloon drinking when Sullivan came. When witness opened Sullivan's pocket book the defendant and others were sitting with him at the table. Witness saw a roll of greenbacks in the purse, but did not know the size of the bills nor how many there were in the purse. He did not know whether or not the defendant could see the roll of bills. Sullivan was very drunk. Witness searched the soldier immediately upon Sullivan's return from the yard. Roddy helped Sullivan to get out of the door going into the yard, and helped him to get in again. Witness searched but one soldier—the one who was not asleep. Officer Abby searched both, when he came. Witness denied that, soon after the soldiers were searched, he told Abby that he had searched the wrong man; that if he had searched defendant he would have found the money. Sullivan did ask witness defendant's name, which witness did not tell him, but witness thought this occurred on the morning after the theft.

J. D. Roberson was the next witness for the defense. He testified that on the thirteenth day of June, 1883, he was keeping the Favorite Saloon, on Commerce street, in San Antonio. Several days before the arrest of the defendant he was at witness's saloon with a roll of fifty or a hundred dollars in greenbacks, which he wanted to exchange for gold. Witness let him have a twenty dollar gold piece. During the six or seven years the witness had known the defendant, his reputation for honesty was good.

Cross-examined, the witness said that the defendant did not keep money with him. There was a gambling room over witness's saloon, in which, however, the witness had no interest. The witness did not know what business the defendant followed at that time.

S. A. Moody testified, for the defense, that he was not in San Antonio at the time of the alleged theft. A few days before witness left San Antonio, late in January, he met the defendant in Roberson's saloon and gave him eight five dollar bills for two twenty dollar gold pieces. Defendant's reputation for honesty, as witness had known it for eight or nine years, was good.

Henry Ansell testified that he was the book keeper at the Vaudeville theatre and bar. The defendant was employed at

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Statement of the case.

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that bar for about three months, at a salary of sixty-five dollars a month. He left the employ of the Vaudeville some time in January, 1883, when the witness paid him sixty odd dollars. Witness had known the defendant since his first arrival in San Antonio, about a year before the arrest. His reputation for honesty had been good.

Cross-examined, the witness denied that he had ever said to any one that he paid the defendant only two or three dollars when he quit work, and that he did quit work in December, 1882. Witness kept the books. They were not now accessible. They belonged to the estate of Jack Harris, were locked up in the safe, and Billy Sims has the key.

Justice of the peace Anton Adam testified that he held the examining trial in this case. Sullivan, in testifying for the State, first identified the defendant as the man who stole his money, then he said that he thought another man who sat near the defendant was the guilty party. Then he walked up near the parties and said: "My eyes are so sore I can hardly see, but I believe this (pointing to defendant) is the man."

Cross-examined, the witness said that the defense placed next the defendant a man cleanly shaved except the mustache, and dressed like the defendant. Sullivan's eyes, at that time, were very sore, and it was evident that he could see only with great difficulty. Defendant and the man who sat next him favored considerably, except that the defendant's mustache was the lighter. Counsel tried to get Sullivan to say that the mustache of the man who robbed him was dark. Counsel then asked Sullivan to describe the thief, and his description suited the defendant exactly. It also suited the other man, except as to the color of the mustache.

August Krawitz testified that he was guarding the defendant on the examining trial. When Sullivan was first told to identify the man who robbed him, he pointed out the man who sat beside the defendant.

Cross-examined, the witness said that Sullivan's eyes, at that time, were very sore and inflamed, and he, Sullivan, complained that he could see scarcely at all.

Charles Abby testified, for the State, in rebuttal, that he was a policeman. He was called in by Major Leriok to see about a reputed theft of money by two soldiers. Witness searched these soldiers carefully, and found a dollar and thirty-five cents on one of them, and nothing on the other, who was drunk and

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Statement of the case.

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asleep. This last one he arrested for being drunk; the other he sent to quarters. Witness searched the premises unsuccessfully for the money. When witness returned from the calaboose, whither he had taken the drunken soldier, to prosecute further search, Henry Delespin, the bar keeper said to him: "You arrested and searched the wrong parties. If you had arrested the man we spoke of arresting the other day as a vagrant, you would have got the right man, and might have found the money." The defendant was the man alluded to as the man whose arrest as a vagrant was discussed a day or two before.

Witness met Sullivan at police headquarters next morning, and was sent with him to Mr. Adam's to file complaint. Adam refused to receive complaint unless Sullivan could name the party; which Sullivan said he could not do, though he said he would know the party on sight. Adam then directed witness to go with Sullivan and arrest the party if identified. They met the defendant at the corner of Main Plaza and Commerce street, and Sullivan whispered to witness: "There is the man now." Witness stepped up to the defendant in a crowd and arrested him. Defendant said: "I know what it is for." Witness then took the defendant to Captain Hughes in a barber shop; thence to Hughes's office, where Hughes afterwards searched him. Sullivan then went to Adam and filed complaint.

Cross-examined, the witness detailed the result of the search of defendant as Captain Hughes did. He had no ill will towards defendant though once, when he, witness, was a hackman, they had some words. He drove the defendant and a fast woman named Alice to the train early one morning. When they went to get out witness discovered that one of them had expectorated over the seats. He asked who did it. Defendant said that he did. Witness told him that he must not spit on the seats. Defendant replied that he would do as he d—d pleased in the hack. Witness replied that "that if it d—d pleased him to spit on the seat, then he would not do as he d—d pleased in that hack." This was the extent of the only disagreement that had ever occurred between witness and defendant.

The motion for new trial was based on the issues discussed in the opinion.

The Reporters have received no brief for appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

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Opinion of the court.

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HURT, JUDGE. The term of court began on the third day of September, 1883. On the second and seventeenth days of November, 1883, in term time, appellant made application in writing for attachments for several witnesses. These applications were sworn to, and contained all the requisites of Article 489, Code of Criminal Procedure. The learned judge presiding refused the applications, and the attachments were not issued. On the twenty-first day of November the cause was called for trial, and the appellant moved the court to postpone the trial to some future day of the term, in order to procure the attendance of the witnesses for whom attachments had been applied and refused. In his motion to postpone, in lieu of diligence he pleads these applications for attachments and the court's refusal to grant them. This motion to postpone was overruled by the court, and, being tried and convicted, appellant appeals and assigns as error the refusal of the court to grant his applications for attachments, and his motion to postpone the trial.

Two questions are presented: 1. Was the appellant, at the time and under the circumstances, entitled to his attachments? 2. Having been refused these, must the judgment be reversed, or shall this court apply the same rules of law to this matter as are applicable to motions for continuance?

First question: Was appellant entitled to the attachments? By the Bill of Rights, section 10, in all criminal cases the accused "shall have compulsory process for obtaining witnesses in his favor." This right of the accused is controlled and restricted by Articles 488 and 489 of the Code of Criminal Procedure, and these restrictions are reasonable and just. But, though restricted, the right of the accused to compulsory process for his witnesses is very clearly and emphatically stated in Articles 488 and 489. These articles are as follows:

Article 488. "When a witness, who resides in the county of the prosecution, has been duly served with a subpoena to appear and testify in any criminal action or proceeding, and fails to so appear, the State or the defendant shall be entitled to have an attachment issued forthwith for such witness."

Article 489. "Where a witness resides out of the county in which the prosecution is pending, the defendant shall be entitled, on application, either in term time or in vacation, to the proper clerk or magistrate, to have an attachment issued to compel the attendance of such witness. Such application shall be in writing and under oath, shall state the name of the witness



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Opinion of the court.

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and the county of his residence, and that his testimony is material to the defense."

By the applications, it appears that the absent witnesses "resided out of the county in which the prosecution was pending," and hence they were based upon Article 489. As before stated, these applications were in writing, under oath, and stated the names of the witnesses and the county of their residence, and that their testimony was material to the defense. Having complied with the requisites of Article 489 strictly, evidently the accused, the appellant, was entitled to his attachments, unless this Article has been modified or repealed by subsequent legislation. Has this Article been repealed or so changed as to require something further to be done by the accused than is required by Article 489 to entitle him to his attachments? It is insisted by the State that this Article has been repealed or so modified as that this matter is left in the sound discretion of the trial judge, if the application be made in term time, and that this is the effect of the act of April 23, 1883.

Let us examine this act briefly. What is its subject? It speaks for itself, and in such language as cannot be misunderstood. What says its title, which *must express its subject*? It says that this is "An act to provide for the payment of the expenses of attached witnesses in felony cases."

Was it the object and purpose of the Legislature in this act to repeal or modify the Constitution or existing laws of this State guaranteeing to the accused compulsory process for obtaining witnesses in his favor? Testing the act by its title—and this is the only test, it being absolutely required that the subject be *expressed in the title*—it is evident that there was but one subject in regard to which legislation was proposed, which was to provide for the payment of the expenses of attached witnesses in felony cases. On the other hand, however, if any subject other than "to provide for the payment of the expenses of attached witnesses in felony cases" is embodied in the act, it not being expressed in the title of the act, such foreign matter—matter foreign to the subject *expressed in the title*—is void; that is, the act as to this foreign matter is void.

We are of the opinion that Article 489 of the Code of Criminal Procedure was not intended, nor, in fact, repealed or modified by the act of April 23, 1883; that the only object of this act was, as is expressed very clearly in its title, to provide for the payment of the expenses of attached witnesses in felony cases.

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Opinion of the court.

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And we are further of the opinion that, if said act contains other matters and treats of other subjects, so far as this may be the case that act is void, because not expressed in its title.

Appellant, therefore, having been deprived of compulsory process for his witnesses, after having complied with the reasonable regulations prescribed in Article 489, was deprived of a legal right—a right of the most vital importance to those accused of crime. Is he, therefore, entitled to a reversal of the judgment, or must the rule contained in Article 560, Code Criminal Procedure, apply? What is the rule in this Article? It is this: “The truth of the first or subsequent application, as well as the merit of the ground set forth therein, and its sufficiency, shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right; *provided*, that should an application for a continuance be overruled and the defendant convicted, if it appear upon the trial that the evidence of the witness, or witnesses, named in the application was of a material character, and that the facts set forth in said application were probably true, a new trial should be granted,” etc.

Must the rules and principles enumerated above be applied to a case in which the defendant has been denied and refused a plain legal right? Not only so, but denied a right given him by the supreme law of this State—that law over which the Legislature has no control, and beyond the reach of the mighty powers of legislation? We think not. What a fearful doctrine, indeed, to deny and refuse the accused compulsory process for his witnesses—force him to trial—and when, after his conviction, he moves for a new trial, to test the materiality and probable truth of the evidence of his absent witnesses *by the testimony introduced by the State!*

In a case in which the application for continuance has been overruled, if it *appear upon the trial* that the evidence of the witnesses named in the application was material and probably true, a new trial should be granted. If it appear upon the trial from the evidence adduced—all of the evidence, both for the State and the defendant—that the evidence of the witnesses named in the application was material and probably true, a new trial should be granted. Now, in testing the materiality and probable truth of the evidence of the witnesses named in the application, the convicted party has the right to rely and insist upon the whole record—all of the evidence in his favor, as well

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Statement of the case.

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as that against him—and, looking to the whole statements of facts, if the evidence of the witnesses named in his application appear to be material and probably true, the law gives him a new trial.

What an alarming doctrine, indeed, that the accused can be denied his process for his witnesses, and, after his conviction, test his right to a new trial by the evidence of the State, or the evidence of the State and the evidence of just so many witnesses as the trial judge may see fit to grant him!

We are of the opinion that the appellant has been denied a legal right—one the benefit of which he used the means to obtain prescribed by the law of the land—a right of the most vital importance to his defense and common justice, and that his conviction has not been by due process of law; for which the judgment must be reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 21, 1884.

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[No. 2990.]

**JAMES BOWMAN v. THE STATE.**

**PLAYING CARDS IN A PUBLIC PLACE.—INDICTMENT,** to sufficiently charge the offense of playing cards in a public place, must allege the facts which constitute the place of playing a public place, unless it be a place specifically named in the statute. See the opinion for an indictment held insufficient

**APPEAL** from the County Court of Coleman. Tried below before the Hon. W. O. Read, County Judge.

The opinion sufficiently discloses the case. The penalty imposed was a fine of ten dollars.

*Coleman & Randolph*, for the appellant.

*J. H. Burtis*, Assistant Attorney General, for the State.

## Syllabus.

HURT, JUDGE. This is a conviction for card playing. The charging part of the indictment is as follows: "Did then and there unlawfully play at a game with cards in a public place, to wit: In the room back of the Gilt Edge saloon."

At a former day of this term, in the case of *Jackson v. The State*, ante, page 373, this court passed upon an indictment containing the same charge as that in this case, and held the same insufficient. Upon authority of that case and the following others, the indictment in this case is also held insufficient: *Shihagan v. The State*, 9 Texas, 430; *Alvey v. The State*, 26 Texas, 155; *Ellsberry v. The State*, 41 Texas, 158; *Millican v. The State*, 25 Texas, 644; *State v. Barnes*, 25 Texas, 654.

Because of the insufficiency of the indictment, the judgment is reversed and the prosecution dismissed.

*Reversed and dismissed.*

Opinion delivered June 21, 1882.

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No. 3211

GEORGE TAYLOR v. THE STATE.

1. PRACTICE—APPEALS TO THIS COURT—CASE ATED.—The appellant was convicted in a justice's court for carrying a pistol, and his punishment was assessed at a fine of twenty-five dollars. His appeal to the county court was there dismissed on the ground that his appeal bond was defective; from which judgment of the county court appeal is prosecuted to this court. A motion is made by the Assistant Attorney General to dismiss this appeal because this court has no jurisdiction of appeals from justices' courts wherein the fine, exclusive of costs, does not exceed one hundred dollars. *Held*, that Section 16 of Article 5 of the Constitution, which provides "that in all appeals from justices' courts there shall be a trial *de novo* in the county court, and when the judgment rendered or the fine imposed by the county court shall not exceed one hundred dollars, the trial shall be final," applies only to trials *de novo* on the merits in the county court, and not to such proceedings as were had in this case. In other words, an appeal lies to this court from a judgment of the county court, dismissing an appeal from a justice's court, when the amount of the judgment was for more than twenty dollars; wherefore the motion to dismiss this appeal is overruled.
2. APPEAL BOND.—In order to bind a party to a written contract it is not necessary that his signature should appear at the end of it. If he writes his

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Opinion of the court.

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name in any part of the agreement, it may be taken as his signature, provided it was there written for the purpose of giving authenticity to the instrument, and thus operating as a signature. In holding the appeal bond from the justice's court defective because the appellant signed his name in the middle instead of at the end, the county court erred.

8. SAME.—The county court erred in dismissing the appeal from the justice's court because it appeared that the bond had not been approved by the justice. The rule is: "The statute requiring the justice to approve the bond taken by him from a party held to appear in the district court, etc., is directory, and the bond is not a nullity because the magistrate neglects to endorse his approval on it. The approval may be inferred from his return of the bond to the district court."

APPEAL from the County Court of Wilbarger. Tried below before the Hon. J. P. Orr, Special County Judge.

The opinion discloses the case.

*Wheeler & McGhee*, for the appellant: 1. Signature of the party bound is sufficient if written in the body of the bond; citing *Alexander v. Baylor*, 20 Texas, 560; *Fulshear v. Randon*, 18 Texas, 275; *Prince v. Thompson*, 21 Texas, 460

2. It was not essential to its sufficiency that the appeal bond should have been formally approved by the justice of the peace; citing *Daughy v. The State*, 33 Texas, 1; *Dyches v. The State*, 24 Texas, 266; *Cuniff v. The State*, 38 Texas, 641

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. Prosecution was commenced in this case by complaint filed in a justice's court, charging appellant with unlawfully carrying a pistol. Defendant was tried, and his punishment assessed at a fine of twenty-five dollars, in the justice's court. He appealed to the county court, where his appeal was dismissed because of insufficiency of his appeal bond, and he has appealed to this court from the judgment of the county court dismissing his appeal in that court.

A motion is now made by the Assistant Attorney General to dismiss the appeal in this court because this court has no jurisdiction, inasmuch as the fine, exclusive of costs in the justice's court, did not exceed one hundred dollars.

It is provided by the sixteenth section of article five of the Constitution that "in all appeals from justices' courts there shall

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Opinion of the court.

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be a trial *de novo* in the county court, and when the judgment rendered or fine imposed by the county court shall not exceed one hundred dollars the trial shall be final." Had there been a trial *de novo* and a fine of less than one hundred dollars, then such trial would have been final, and this court would have had no jurisdiction on this appeal. But there was no trial *de novo* in the county court; the appeal was dismissed, without a trial, for supposed errors in the appeal bond. "The limitation imposed by Section 16, Article 5, of the Constitution, on appeals from the county court in causes appealed from a justice's court, applies only when there has been a trial *de novo* on the merits and the recovery was less than one hundred dollars. An appeal lies to the Court of Appeals from a judgment of the county court dismissing an appeal from a justice's court where the amount of the judgment was for more than twenty dollars. (*Pevito v. Rodgers*, 52 Texas, 581.)

The motion of the Assistant Attorney General to dismiss this appeal is not well taken, and is overruled.

Did the county court err in dismissing the appeal from the justice's court because the appeal bond was insufficient and defective? Two objections were made to the bond in the motion to dismiss, viz: 1. Because George Taylor, the principal, had signed his name in the centre instead of at the end of the bond. 2. Because the bond did not show that it had been approved by the justice trying the case below.

"In order to bind a party to a written contract it is not necessary that his signature should appear at the end of it. If he writes his name in any part of the agreement it may be taken as his signature, provided it was there written for the purpose of giving authenticity to the instrument, and thus operating as a signature." (*Fulshear v. Randon*, 18 Texas, 275.)

Nor was the second ground of the motion well taken. In *Dyches v. The State*, 24 Texas, 266, it was held that "the statute requiring the justice to approve the bond taken by him from a party held to appear in the district court, etc., is directory, and the bond is not a nullity because the magistrate neglects to endorse his approval on it. The approval may well be inferred from his return of the bond to the district court." (*Doughty v. The State*, 33 Texas, 1; *Cundiff v. The State*, 38 Texas, 641.)

Because the county court erred in dismissing the appeal from

## Syllabus.

the justice's court, for supposed defect in the appeal bond, the judgment is reversed and the cause remanded for a trial *de novo* on its merits.

*Reversed and remanded.*

Opinion delivered June 21, 1884.

[No. 3205.]

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28	214
16	517
30	351
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## N. A. HOBBS v. THE STATE.

1. ASSAULT WITH INTENT TO MURDER—HEARSAY TESTIMONY.—The defense in a trial for assault to murder proposed to prove by a witness that an officer, a short time before the shooting, directed one of the parties shot to take the other party from a saloon to his home because he was intoxicated. *Held*, that such evidence was clearly hearsay and irrelevant, and was properly excluded.
2. SAME—EVIDENCE.—The defendant was a watchman at a railroad freight depot, and in the night time fired upon and wounded two men passing near the depot. *Held*, that, as tending to throw light upon the question of motive in shooting, and as having a tendency to mitigate, if not to justify, the conduct of the defendant in shooting, he was entitled to prove that there had been a great deal of car breaking and stealing from the cars at the depot where he was on duty as guard.
3. SAME.—The competency as evidence of a defendant's explanation, made directly after the commission of the alleged offense, depends entirely upon whether or not such explanation, if material, is also a part of the *res gesta*. In determining whether or not such explanation is or is not a part of the *res gesta*, the test is, were the declarations the facts talking through the party, or the party talking through the facts? In this case the bill of exceptions taken to the rejection of the proposed explanation fails to disclose what that explanation was. Under such circumstances, this court cannot pass upon the question of materiality. See the opinion *in extenso* on the question.
4. SAME—CHARGE OF THE COURT.—See the opinion *in extenso* for a state of case wherein the court below should have instructed the jury as to the law of aggravated assault and battery.
5. SAME—SELF-DEFENSE—MANSLAUGHTER.—Upon the question of self-defense, the trial court properly charged that the defendant's right of self-defense ceased when his danger, real or apparent, ceased. But note the opinion for circumstances under which, if death had resulted from an assault, the offense would not have been of a grade higher than manslaughter.
6. SAME—AGGRAVATED ASSAULT AND BATTERY—FACT CASE.—It is the duty

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Statement of the case.

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of the trial court to instruct the jury upon every phase of case suggested by the proof, however slight may be the testimony supporting it. See the statement of the case for evidence demanding a charge upon the law of aggravated assault and battery.

APPEAL from the District Court of Anderson. Tried below before the Hon. J. J. Perkins.

The conviction was for an assault with intent to murder one S. R. Montgomery and one J. M. Whiteley, in Palestine, Anderson county, Texas, on the twenty-first day of September, 1882. The penalty awarded was a term of five years in the State penitentiary.

J. M. Whiteley was the first witness for the State. He testified in substance that on the night of September 21, 1882, he and Montgomery left their boarding house, west of the railroad track, in Palestine, going to town. After going to several places, they entered Amson's saloon, remaining there, with others, until near eleven o'clock, when, arm in arm, they started to their boarding house, a quarter of a mile distant. They took the line of the railroad track as being the shorter route, as they and others had often done before. They reached a point beyond the switches, and were nearing the water tank, when some one to their right called out: "Where are you going?" Montgomery, who was nearest, replied: "It is none of your business." A few steps further on witness and Montgomery encountered two men—the defendant, with a dark, or burglar's, lantern, and Mr. Hill, with a white lantern. Defendant turned his light on Montgomery's face, and almost simultaneously brought a pistol down in his right hand, saying: "I will show you whether it is any of my business." Witness at that time had an umbrella under his left arm, and his right akimbo, the hand resting on his breast. Montgomery's left hand was in witness's right arm. As defendant brought down the pistol, Montgomery jerked his hand from witness's arm and caught at the pistol. Defendant fired instantly, the ball passing into Montgomery's arm above the elbow and coming out at the shoulder, powder burning the coat. Montgomery stepped to one side and said: "I am shot." Witness stepped to the other side of defendant, when defendant again fired, striking witness in the left wrist. As the witness was passing on from the defendant, the defendant fired again, striking witness in the left knee from the rear, and bringing him to the ground. The defendant then said: "I am the watchman



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Statement of the case.

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here, and I will have you understand that when I ask who you are, you must tell me." He then walked off.

Neither the witness nor Montgomery were armed at that time. Nothing more than stated by witness was said at the time. Defendant did not say that he was watchman until after he had shot witness and Montgomery. Witness knew that there was a night watchman for the freight cars, but at the time of the shooting he and Montgomery were forty or fifty steps from those cars, going south. The cars stood west. Witness did not then know defendant nor Hill, nor did they know him. Witness was taken home by some parties he did not know, after lying on the ground for some time. Witness now uses crutches, and supposes he is a cripple for life. Witness was an engineer employed at Dilley's foundry, Montgomery a locomotive engineer in the employ of the railroad company.

S. R. Montgomery, the next witness for the State, testified substantially as Whiteley did, and the State rested.

The defense first introduced J. C. Hill, who testified that he and defendant were guards at the Palestine railroad yards, and were on duty the night of the shooting. Defendant and the witness were near the tank when they heard two men approaching, talking loudly and noisily as if drinking. It was dark and the men had no lights. Witness had no light. When within twenty or thirty feet of them the defendant called out: "Who are you, and where are you going?" Montgomery replied: "It is none of your d—d business." Witness suggested to defendant that they be permitted to pass. Defendant said: "No, we ought to see who they are, and what they are doing here." Witness then stepped aside and defendant threw the light of his dark lantern on the faces of the men and said: "I am the guard here, and it is my business to know who you are and what you are doing." Montgomery replied: "D—n you, I'll show you who we are," making a quick movement and passing his hand to his right hip pocket. Witness could not see his left hand. At this time a shot was fired; another instantly followed, and the parties scattered and separated. A third shot was then fired, and Whiteley fell to the ground, just beyond Montgomery, who did not fall. Defendant went for Mr. Calloway, who with others came, and shortly the wounded men were taken away. Witness was armed but did not draw his pistol.

Policeman Frank Durham testified, for the defense, that he saw Montgomery and Whiteley at Amson's saloon a short while

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Opinion of the court.

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before the shooting. Montgomery was getting pretty full of intoxicating liquor when he and Whiteley left. When witness heard the shooting he went rapidly to the depot and found that defendant had shot Montgomery and Whiteley. He arrested defendant.

W. P. Calloway, general freight agent in charge of the railroad yards at Palestine, testified, for the defense, that the defendant was a guard appointed to protect the yards and freight cars of the railroad. Witness was in his office when the shooting occurred. The defendant was the first to report the occurrence to him. Defendant suggested that witness go to the men while he went for a doctor, which was done. Defendant made a statement of the occurrence to the witness. This statement, however, the witness was not permitted to repeat. The wounded parties were being taken off when witness reached them.

Doctor G. S. West testified, for the defense, that he was called by the defendant to see the wounded men. There were no indications that the wounded men were drunk or had been drinking.

Mike Sano, bar tender at Amson's saloon testified, for the defense, that the two wounded men drank several schooners of beer at the saloon before the shooting, but neither of them was drunk.

The motion for new trial raised the questions involved in the opinion.

*J. Y. Gooch*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** 1. It was not error to reject the testimony offered by the defendant to prove that the officer, Durham, a short time before the shooting, had told Whiteley to take Montgomery away from the saloon, and to his home, because he was intoxicated. This was hearsay and irrelevant. It was permissible for the defendant to prove that Montgomery and Whiteley, or either of them, was intoxicated on the occasion, and he was allowed to introduce such testimony.

2. We think the court erred in rejecting testimony offered by the defendant to show that, prior to the shooting, there had been a great deal of car breaking and stealing from the cars at the depot, where the defendant was on guard. This evidence would

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Opinion of the court.

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have been competent and pertinent to throw light upon the motive or intent which actuated the defendant on the occasion of the shooting. It constituted a part of the circumstances of the case, and tended to elucidate the conduct of the defendant—if not to justify, perhaps to mitigate it. (Whart. Crim. Ev., secs. 23, 24.)

3. The defendant proposed to prove the explanation made by himself of the shooting a few minutes after it occurred. We are not informed by the bill of exceptions taken to the rejection of this proposed testimony what his explanation was, and hence we cannot judge of its materiality, and cannot say that the court erred in rejecting it. Such explanation may have been in accord with the testimony of the State's witnesses, and, if so, certainly its rejection did not injure the defendant, and would not be error, if error at all, of which he could complain. (*Davis v. The State*, 14 Texas Ct. App., 645.) If, in fact, the declarations made by the defendant were material, then their admissibility would depend upon whether or not they were part of the *res gestæ*. "Declarations made by a defendant in his own favor, unless part of the *res gestæ*, or of a confession offered by the prosecution, are not admissible for the defense. \* \* \* It is otherwise when such declarations are part of the *res gestæ*. It is not, however, necessary that such declarations, to be part of the *res gestæ*, should be precisely concurrent with the act under trial. It is enough if they spring from it, and are made under circumstances which preclude the idea of design. The test is, were the declarations the facts talking through the party, or the party's talk about the facts. *Instinctiveness* is the requisite, and when this obtains, the declarations are admissible. (Whart. Crim. Ev., secs. 690, 691.)

"If the declarations appear to spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at a time so near to it as reasonably to preclude the idea of deliberate design, then they are to be regarded as contemporaneous." (*Booth v. The State*, 4 Texas Ct. App., 202; *Talliaferro v. The State*, 40 Texas, 523; *Brunet v. The State*, 12 Texas Ct. App., 521.) If, under the above stated rules defendant's explanation of the shooting constituted a part of the *res gestæ* of the same, he is entitled to have them before the jury as evidence. The question of the admissibility of such declarations is for the trial judge to determine, and the weight to which the same is entitled is a matter for the jury to decide.

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Opinion of the court.

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4. In instructing the jury upon the law of the case, the learned judge did not submit the issue of aggravated assault and battery, and refused special instructions requested by the defendant embodying the law of manslaughter and aggravated assault and battery. Exceptions were taken by the defendant to the charge of the court because of said omission, and to the action of the court refusing special instructions asked. It was the opinion of the learned trial judge that the evidence did not raise the issue of aggravated assault and battery; that, if the parties shot had died from their wounds the homicide would have been murder, or justifiable, and could not have been manslaughter. We must differ with him in this view of the case. By the testimony of the witness Hill, who was present and saw and heard what transpired on the occasion, it was proved, substantially, that the defendant threw his light on Montgomery and Whiteley and said to them: "I am the guard here, and it is my business to know who you are and what you are doing." Montgomery answered: "D—n you, I'll show you who we are"; at the same time he, Montgomery, made a quick movement and his right hand passed to his right hip pocket. As this was done, a shot was fired, and in an instant another shot was fired, and the parties then scattered and separated a few yards, and then the third shot was fired and Whiteley fell. Montgomery did not fall. Witness was on duty with the defendant, guarding the railroad yard from traspasgers. This occurred about eleven o'clock at night, and the night was dark, and it occurred on the said railroad yard. It appears from other evidence in the case that one shot took effect in Montgomery's arm, one took effect in Whiteley's arm, and another in Whiteley's leg, and from the effects of this last shot Whiteley fell. When the shooting began the parties were close together. The first shot fired wounded Montgomery. Whiteley when shot was beyond Montgomery from the defendant, that is, Montgomery was between Whiteley and the defendant. When the defendant fired the last shot, which struck Whiteley in the leg, he, Whiteley, was walking off from the defendant.

This evidence presents the issue of self-defense in the shooting of Montgomery, and also the accidental shooting of Whiteley. Upon these issues the court very properly, and we think correctly, instructed the jury. But while these issues are presented, is there not another phase of the case which this testimony tends to establish? Suppose the evidence was not sufficient in the esti-

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Opinion of the court.

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mation of the jury to show self-defense, but was sufficient to show violent demonstrations on the part of Montgomery, sufficient under the circumstances to excite in the mind of defendant sudden passion, rendering him incapable of cool reflection, and sufficient to excite such sudden passion in a person of ordinary temper, and that, acting under this sudden passion, arising from adequate cause, he did the shooting, then, while the defendant's act would not be justifiable, still it would not be an assault with intent to murder, but would be an aggravated assault and battery.

Again, the learned judge instructed the jury that the defendant's right of self-defense ceased when the danger, real or apparent, had ceased. This was correct. But suppose, in defending himself against a violent attack, or a supposed violent attack, he became excited by passion to such an extent as to render his mind incapable of cool reflection, and under this state of excitement he carried his right of self defense too far, used more force than was necessary to his protection, fired one or more shots after all real or apparent danger had ceased, but before his mind had had time to cool, and from wounds thus inflicted death had resulted, would this have been murder? We think not. Suppose the first shot fired by the defendant was justifiable, but that the two shots fired by him which struck Whiteley were fired after the danger, real or apparent, which threatened the defendant had ceased, but that he fired the said shots under the immediate influence of sudden passion, arising from the supposed deadly conflict in which an instant before he had been engaged, and fired them before he had had reasonable "cooling time," reasonable time to realize that he was no longer in any danger, would not this state of facts, if the shots had killed Whiteley, constitute manslaughter and not murder? We think a homicide under these circumstances would not be of a higher grade than manslaughter.

In our opinion the evidence fairly raises the issue of aggravated assault and battery. The evidence tending to support this phase of the case may be very slight, and perhaps not sufficient in the mind of this court or of the trial court to require serious consideration, yet this does not relieve the court from submitting the issue to the jury. It is for the jury to pass upon such issue, and determine whether or not the evidence sustains it. We think the evidence demanded a charge such as was requested

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by the defendant, and that the court erred in not giving such a charge.

Because of the errors we have pointed out, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered June 25, 1884.

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[No. 3224.]

THOS. M. CHILDERS v. THE STATE.

1. CONTINUANCE—DILIGENCE.—Failing to show the exercise of due diligence in the effort to secure the attendance of the alleged absent witnesses, an application for a continuance is properly refused.
2. INDICTMENT—EVIDENCE.—An indictment for swindling having unnecessarily described the money obtained by fraudulent representations to be "good, lawful and current money of the United States of America," it was essential to the validity of the conviction that the money be proved as alleged.
3. SWINDLING—FACT CASE.—See the opinion *in extenso* for evidence held insufficient to sustain a conviction for swindling.

APPEAL from the District Court of Travis. Tried below before the Hon. A. S. Walker.

The conviction was for swindling the State of Texas in the amount of one hundred and fifty dollars. Five years in the penitentiary was the punishment awarded the appellant.

*George S. Walton and Robt. G. West, for the appellant.*

*J. H. Burts, Assistant Attorney General, for the State.*

WILLSON, JUDGE. 1. Several special exceptions to the indictment were made and overruled in the trial court. These exceptions are not insisted upon in this court by defendant's counsel, and we shall therefore not discuss them. We will say, however, with regard to the indictment, that we have carefully examined it in the light of the exceptions made to it, and we think it is a good indictment in all essential respects. It charges the offense of

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swindling very fully and accurately, specifically informing the defendant of the matters which he is called upon to answer.

2. It was not error to overrule the defendant's application for a continuance, because said application fails to show that the requisite diligence had been used by the defendant to obtain his witnesses.

3. The defendant's counsel rely mainly for a reversal of the judgment upon the ground that the verdict of the jury is without evidence to support it. It is alleged in the indictment, substantially, that the defendant acquired from the State of Texas one hundred dollars, in "good, lawful and current money of the United States of America, being currency bills"; that he acquired this money by means of false and fraudulent representations and pretenses made to certain officers of said State, to-wit: R. B. Hubbard, Governor; I. G. Searcy, Secretary of State; S. H. Darden, Comptroller; and A. J. Dorn, Treasurer, setting forth fully and in detail the said false and fraudulent representations and pretenses. These representations and pretenses, as set forth in the indictment, consisted mainly of certain written instruments, as follows:

1. A pretended receipt purporting to be executed by J. B. Tyers, sheriff of Limestone county, acknowledging that said sheriff had received from Thomas M. Childers the body of one Wood Trammel, charged with murder.

2. The certificate of I. G. Searcy, Secretary of State, that a reward of one hundred and fifty dollars had been offered by the Governor of Texas for the arrest and delivery of Wood Trammel to the sheriff of Limestone county.

3. An account in favor of Thomas M. Childers against the State of Texas for one hundred and fifty dollars for the arrest and delivery of said Wood Trammel to the sheriff of Limestone county, approved for said amount by R. B. Hubbard, Governor.

4. A treasury warrant, issued by S. H. Darden, Comptroller, to T. M. Childers, for the said sum of one hundred and fifty dollars for the arrest of said Wood Trammel, and endorsed "Thomas M. Childers," and upon which warrant, it is alleged, the defendant obtained from the Treasury of the State the said sum of one hundred and fifty dollars.

These papers were all introduced in evidence by the State, without objection on the part of the defendant. What was the legal effect of this testimony? The indictment was, in part, founded upon these written instruments, and it was charged

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that the defendant executed the account and endorsed the warrant. It is not charged, however, that he executed the receipt; but it is charged with reference to that instrument that it was false and forged, and that the defendant, knowing it to be such, used it in obtaining the money. These instruments, having been read in evidence without objection on the part of the defendant, sufficiently proved that the defendant was the person who made the account and who endorsed the warrant. But does this testimony prove that he presented the receipt to the Secretary of State and upon the statements therein contained obtained from that officer the certificate, and upon these papers obtained from the Governor the approval of the account, and upon the approved account obtained the warrant, and upon that warrant obtained the money? That he made the account and endorsed the warrant, and that the warrant is found in the Treasurer's office, cancelled, are circumstances tending to prove that the defendant is the person who, by the means alleged, obtained the money. But can it be held that this evidence is sufficient to identify the defendant as the man who thus acquired the money? To our minds, it is very unsatisfactory and uncertain—too much so, we think, to warrant the sanction of this court. If the defendant was the man who presented the receipt to the Governor and Secretary of State, and obtained from the Governor the approval of the account, and made to these officers the representations alleged in the indictment, it is reasonable to suppose that these officers would have some recollection of the transaction, and might be able to identify the defendant. If he was the man who obtained the warrant from the Comptroller, and who obtained from the Treasurer the money upon said warrant, it is reasonable to suppose that these officers, or some of their clerks, would be able to identify him, and to prove beyond question that he thus obtained the money.

But we have no such proof in this case, nor does there appear to have been any effort on the part of the prosecution to make such proof or to account for the absence of it. It is not proved by any witness that the defendant at any time ever made any representations or used any pretenses to any of the officers, as charged in the indictment. There is a total want of proof of these allegations, except that offered by the papers themselves, and in our opinion these papers do not supply the absence of such proof. It devolved upon the State to make this proof, and to make it by the best evidence that the nature of the case would



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admit of, or to account for the absence of such evidence. In this case the best evidence of these facts would be the testimony of the persons to whom the alleged false and fraudulent representations and pretenses were made, and from whom the money was obtained; and this evidence was not adduced by the State, nor is any reason shown why it was not adduced. It does not appear that any witness who testified upon the trial was asked to identify the defendant as the person who perpetrated the swindle, and yet there were witnesses who testified in the case, who might reasonably be supposed to be able to identify him as the guilty party. As presented to this court, the evidence does not support the allegations of the indictment with that certainty demanded by the law in prosecutions for crime, and, in our judgment, is insufficient to support this conviction.

4. There is no direct evidence that the defendant received the money upon the warrant, and no effort seems to have been made by the State to prove by direct evidence that he did receive it. Circumstances tend to show that the warrant was paid, and paid to the defendant. These circumstances are that the warrant is found cancelled in the treasurer's office, with the name of the defendant endorsed thereon, the rule of that office being to pay a warrant only to the person in whose favor it was drawn, and to require him at the time of payment to endorse it, and when so paid, to mark it cancelled and file it among the archives of the office. If it had been shown by the State that no better evidence of payment than this could be produced, then this might be considered sufficient, but the facts show with reasonable certainty that better evidence of the payment of the warrant to the defendant does exist, and no reason has been shown why it was not produced. Such being the case, we cannot say that it has been proved as the law requires. But, even were the proof upon this point sufficient, there is no proof of the *kind* of money paid to the defendant on the warrant. It is alleged in the indictment that the money fraudulently acquired by him was "good, lawful and current money of the United States of America, being currency bills." It was unnecessary to thus particularly describe the money obtained. It would have been sufficient to have alleged that it was one hundred and fifty dollars in money. But the pleader, having unnecessarily described the money, thereby limited a matter material to the charge, and the description became essential to the identity of the money, and under the long established rules of criminal pleading such

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Syllabus.

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description is material and must be proved as laid. (*Warrington v. The State*, 1 Texas Ct. App., 168; *Rose v. The State*, Id., 400; *Soria v. The State*, 2 Texas Ct. App., 297; *Hampton v. The State*, 5 Texas Ct. App., 463; 1 Bish. Crim. Prac., sec. 485; 1 Whar. Am. Crim. Law, sec. 629.)

True, the warrant calls for "one hundred and fifty currency dollars," but there is no evidence that "currency dollars" were paid in discharge of the warrants, and that these currency dollars were "good, lawful and current money of the United States of America," as alleged in the indictment. The warrant may have been paid in gold or silver coin, and, if so, certainly the allegation in the indictment would not be sustained. This failure on the part of the prosecution to sustain, by proof, the descriptive averment as to the money is of itself fatal to the conviction.

Because, in our opinion, the evidence does not support the conviction, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 25, 1884.

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[No. 3194.]

JODIE BIRD v. THE STATE.

1. **THEFT—INDICTMENT—VARIANCE.**—The true name of the owner of the alleged stolen property was Sam. McCasland. The indictment alleged his name to be Sam. McCasling. He was shown to have been equally well known by both names. *Held*, that the variance was not material.
2. **SAME—VOLUNTARY RETURN OF STOLEN PROPERTY**, such as under the provisions of Article 378 of the Penal Code will operate to reduce a theft from the grade of felony to misdemeanor, must be made under the following circumstances: 1. The return must be voluntary, that is, willingly made; not made under the influence of compulsion, fear of punishment or threats. If, however, it be made under the influence of repentance for the crime, and with the desire to make reparation to the injured owner, it will be voluntary, although it may also be influenced by fear of punishment. 2. It must be made within a reasonable time after the theft, and before prosecution for the theft has been commenced. 3. It must be an actual, not merely a constructive return of the property into the possession of the owner. 4. The property returned must be the identical property, unchanged and all of it, that was stolen. See the opinion *in extenso* for a review of the authorities on the doctrine.

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2. **SAME—CHARGE OF THE COURT—CASE STATED.**—In this case the defendant drove the stolen animal about ten miles from its range, and attempted to sell it. Pending negotiations of sale, it was discovered by parties acquainted with it, when the party with whom the sale was being negotiated told the defendant to turn it loose, and that they would get it at another time. In a few days the owner told the defendant that all he wanted was the animal, and that if he would drive it back home, he, the owner, would not prosecute him, the defendant. Soon after this the owner found the animal on its accustomed range. *Held*, that under such circumstances the court should have given in charge the issue as to the voluntary return of the animal by the defendant; that, while not strictly a return of actual possession, it was such as was demanded by the owner, and therefore sufficient.
4. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**—See the statement of the case for the substance of affidavits in support of a motion for new trial based upon newly discovered evidence, *held* sufficient to authorize the award of a new trial.

APPEAL from the District Court of Milam. Tried below before the Hon. W. E. Collard.

The conviction was for the theft of one head of cattle, the property of Sam. McCasling, in Milam county, Texas, on the tenth day of December, 1883. The penalty awarded was a term of two years in the penitentiary.

J. B. Bryant was the first witness for the State. He testified, in substance, that on the night of the tenth day of December, 1883, he got home from the town of Rogers and found the defendant and Granger Elliot in bed at his house. Next morning the defendant told witness that he had brought a steer to sell him, and that the steer was tied on the side of the road near by. Defendant, Elliot and witness started down the road to look at the animal. Witness saw that the animal was not fat enough for beef, declined to buy it, and told the boys to release it. The animal was a white and black pided steer, branded SAMY on the ribs. *En route* to the point where the steer was tied, the party saw Pinkney Bird, James Cook and another man looking at the steer. Witness and the two boys did not then go to the steer. It was then that the witness told the boys they had better turn the steer loose, and they would get it some other time. The boys did release the steer.

Sam. McCasland testified, for the State, in substance, that he lived in Bell county, and owned a small stock of cattle in the SAMY brand. Among them was a two year old white and black pided steer. He learned that this steer had been seen by

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Pink. Bird and others tied to a tree near J. B. Bryant's, in Milam county. He then went to defendant and told him that he had heard of his driving the steer to Jesse Bryant's. Defendant said: "Yes, I did drive one of your steers to Jesse Bryant's." Witness asked him why he did so. He replied that Bryant had promised him twelve dollars and a half to bring him a steer, and that the witness's steer was the first one he found. He told the witness that he and Granger Elliot drove the steer to Bryant's, tied it out over night, and started next morning with Bryant to see it, but saw Pink. Bird, Jim Cook and some one else looking at it, when Bryant told them they had better turn it loose and get it some other time. Defendant made these statements to witness voluntarily, without threat or persuasion. Witness afterwards told him that he only wanted the steer, and that if he would drive it back, he would not prosecute, unless forced to do so by the grand jury. Bryant lived in Milam county, about ten miles from the steer's range. Witness never consented that the defendant, Elliot, or any one else, should drive the steer off. A few days after the interview with defendant, witness found his steer on its accustomed range. Witness's name was Sam. McCasland, but he was equally well and generally known as Sam. McCassling.

Pinkney Bird testified, for the State, that he saw the steer described tied to a tree on the road near J. B. Bryant's, on the morning of December 11, 1883. He saw Bryant, defendant and Elliot near it. Defendant turned the steer loose. Witness saw that animal again late that evening, about one hundred yards from where he saw it in the morning, feeding along in a hollow.

The motion for new trial raised the issues considered in the opinion. The newly discovered evidence referred to in the last head note of this report was to the effect that the witnesses L. G. and W. W. McDaniel would testify on another trial that, on the twenty-fifth day of December, 1883, they had a conversation with Sam. McCasland; that in that conversation McCasland told them that he went to see the defendant about the alleged theft of the steer; that he told the defendant that he had heard that he, defendant, had driven off one of his steers; that he wanted him, defendant, to acknowledge that he did so, and bring the animal back, and that if he would do so he, McCasland, would not indict him, unless he was forced to do so by the grand jury, and that thereupon the defendant acknowledged that he drove the steer off, and promised to bring it back. The witnesses L.

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G. and W. W. McDaniel were called as witnesses for the State and placed under the rule, and had heard none of the evidence when they testified in the case. Since the trial they had heard that McCasland testified that defendant's confession or statement was made voluntary and without compulsion or persuasion, and it was only since the trial that they had informed defendant's counsel of their conversation with McCasland. The affidavit of L. G. and W. W. McDaniels were attached to the motion.

*R. Lyles and E. H. Lott*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** 1. Sam. McCasling, the alleged owner of the animal charged to have been stolen, was as well known by that name as by his true name, Sam. McCasland, and there was therefore no fatal variance between the name of the owner as alleged and the evidence of ownership. (Code Crim. Proc., Art. 425; *Rye v. The State*, 8 Texas Ct. App., 163; *Cotton v. The State*, 4 Texas, 260; *Hart v. The State*, 38 Texas, 382; *Bell v. The State*, 25 Texas, 574; *Wells v. The State*, 4 Texas Ct. App., 20.)

2. If property taken under such circumstances as to constitute theft be voluntarily returned within a reasonable time, and before any prosecution is commenced therefor, the offense is a misdemeanor, punishable by fine not exceeding one thousand dollars. (Penal Code, Art. 738.) A return of stolen property, influenced by a threat of prosecution for the theft, is not a voluntary return within the meaning of the statute. (*Owen v. The State*, 44 Texas, 248.) Where a defendant had driven a stolen cow about thirty miles, and was overtaken in possession of the animal, and told that he must return her to her range, and he drove her about ten miles back in the direction of where he had taken her from, and there left her, it was held that this was not a voluntary return within the meaning of the statute. (*Brill v. The State*, 1 Texas Ct. App., 572.) In *Grant v. The State*, 2 Texas Court of Appeals, 163, this court said, referring to this provision of the Code, that "It never contemplated that a thief, caught in possession of property stolen by him, could reduce a felony to a misdemeanor by simply then offering to give up the stolen property or pay for it." In that case the defendant was caught while he was in the act of skinning a hog he had stolen,

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and he then offered to return it to the owner or pay for it. In *Moore v. The State*, 8 Texas Court of Appeals, 496, this court, in discussing this subject, said: "To entitle the thief to the mitigated penalty for a voluntary return of the stolen property within a reasonable time, the return must be actual, and demonstrating in itself a contrition for the act, and not a clandestine return and constructive redelivery of the property. The purpose of the statute is to extend the grace and favor of the law to such wrong doers as promptly repent of their acts, and endeavor to make all the reparation in their power to the party injured. In such cases the law looks with mercy upon the penitent, and administers a modified punishment for its infraction. But when the thief fails in his purpose to realize from the stolen property, and, as in this case, releases the stolen animal, which, of its own motions, returns to its accustomed range, the law delivers the prisoner over to justice, who sits blindfolded and inexorable, and sternly metes out the punishment affixed for the original transgression." In *Allen v. The State*, 12 Texas Court of Appeals, 190, this court, in again treating upon this subject, said: "If the return is caused by fear that discovery has been made, and a prosecution will be set on foot, would it be voluntary? Are the causes and motives inducing the return to govern? If so, of what character or quality must they be? Suppose fear of detection and punishment is the moving cause. Does it follow that the return is not voluntary? Admitting that it does, suppose that repentance and a desire for reparation, together with fear of detection and punishment, all contribute the acting causes prompting the defendant to return the property, will he not be entitled to this generous provision of our Code?" It was held in that case that if the return of the property was actuated by repentance, in connection with a fear of prosecution and punishment, it was nevertheless a voluntary return within the meaning of the law.

We deduce from the decisions upon this question, and from the statute itself, that a voluntary return of stolen property, within the meaning of the Article of the Code cited, must be under the following circumstances:

1. It must be voluntary, that is, willingly made; not made under the influence of compulsion, threats or fear of punishment. If, however, it be made under the influence of repentance for the crime, and with a desire to make reparation to the

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injured owner, it will be voluntary, although it may also be influenced by fear of punishment.

2. It must be made within a reasonable time after the theft, and before prosecution for the theft has been commenced.

3. It must be an *actual*, and not merely a *constructive*, return of the property into the possession of the owner.

4. The property returned must be the identical property, unchanged, and all of it, that was stolen.

In this case, defendant drove the animal from its range a distance of about ten miles, and, while endeavoring to sell it, was discovered by some persons who were acquainted with it, and thereupon defendant was told by the man to whom he was negotiating its sale to turn it loose, and they would get it again at some other time. Defendant turned the animal loose. In a few days thereafter, McCasland, the owner of the animal, told the defendant that all he wanted was the animal, and that if he, defendant, would drive it back home, he would not prosecute him. Soon after this, the animal was found by McCasland in its accustomed range.

We are of the opinion that, under the peculiar facts of this case, the court should have submitted to the jury the issue as to a voluntary return of the animal by the defendant. We think there was evidence sufficient to demand instructions from the court upon this issue. If defendant did, in fact, return the animal within a reasonable time, and in such manner as to satisfy the owner thereof, and in accordance with the owner's directions, and if, in so doing, defendant was actuated by a feeling of penitence for his wrongful act, and a desire to make reparation therefor, we think he would be within the benign operation of this merciful provision of our Code. While such return would not be strictly into the *actual* possession of the owner, still, if it was such a return as the owner desired, and as he was satisfied with, we think it should be held sufficient. The learned judge did not charge upon this issue, nor did the defendant request him to do so, or except to the charge because of such omission; but the matter was called to the attention of the court in a motion for a new trial. We think a charge upon this issue was a part of the law of this case, and that the failure to give it was such error as was calculated to injure the rights of the defendant, and is therefore reversible error.

We are also of the opinion that the court should have granted

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defendant a new trial upon the ground of newly discovered evidence. The evidence set out in the affidavits accompanying the motion was material to show that defendant's confession, which had been admitted in evidence against him on the trial, had been made under the influence of promises and persuasion, and therefore was not admissible. We think it was sufficiently shown that this evidence had been discovered since the trial, and that its not having been discovered sooner was not attributable to any want of diligence on the part of defendant. We think, also, that this evidence would probably change the result of the verdict on another trial. It would, perhaps, have the effect to exclude from the evidence the confession of the defendant, and should it have this effect there is no other inculpatory evidence against the defendant, so far as is disclosed by the record, except that of the witness Bryant, who was, unquestionably to our minds, an accomplice in the theft, and whose testimony is without corroboration, except by defendant's confession.

It appears from this record that defendant is a boy of tender years, about sixteen years of age, and that in the commission of this theft he was aided by another person, and also acted under the instructions of the witness Bryant, who was carrying on the butchering business, and to whom he had taken the animal to be used by Bryant as a beef, and for which Bryant had promised to pay the boy twelve dollars and fifty cents. It seems that this man Bryant has been permitted, in consideration perhaps of his own escape from just punishment, to testify against this boy, and thus destroy evidence which would perhaps cause him, instead of the defendant, to be incarcerated in the penitentiary for this crime.

Because of the errors we have mentioned, and because we believe that justice demands that the defendant should have another trial, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered June 14, 1884.



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Statement of the case.

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[No. 3217.]

## C. H. THOMAS v. THE STATE.

1. ASSAULT WITH INTENT TO RAPE—EVIDENCE.—In order to sustain a conviction for assault with intent to commit rape, the proof must show that the assault was committed with the specific intent to *rape*. No other intent will suffice. For instance, a conviction for such offense is not supported by proof that the accused assaulted a woman with the intent of having improper connection with her, without the use of force, nor without her consent.
2. SAME—BURDEN OF PROOF—CHARGE OF THE COURT.—See the opinion *in extenso* for a charge of the court which, though couched in the language of the Code, and correct in the abstract, is *held* error, inasmuch as its effect is to impose upon the defendant the burden of proving himself innocent of any unlawful intent to perpetrate any offense.
3. SAME—FACT CASE.—See the statement of the case for evidence *held* insufficient to support a verdict for assault to rape, inasmuch as it fails to establish the essential element of intent.

APPEAL from the District Court of Anderson. Tried below before the Hon. J. J. Perkins.

The conviction in this case was for an assault with intent to commit rape upon the person of Ida Kreig, in Anderson county, on the first day of November, 1883. The penalty imposed was a term of five years in the penitentiary.

Ida Kreig was the first witness for the State. She testified, in substance, that she was a girl thirteen years of age. On the night of November 14, 1883, at about seven or eight o'clock, the witness and Henry Carswell, a little boy about eight years old, started down town, in the town of Palestine, Anderson county, to purchase some lace for the witness's sister, who was to be married on the next night. When the witness reached a point in the middle of the street about opposite a store kept by a Mrs. Nelson, the defendant approached the witness and the boy, coming out of Mrs. Nelson's store, with two bottles in his hands, resembling soda water bottles. He told witness and the boy to drink. The boy drank from one of the bottles. The witness took the other bottle in her hand, but did not drink. She gave it back to the defendant, and he put it in his pocket. The defendant took the witness's hand with his left hand when he gave

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Statement of the case.

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her the bottle. She expected him to release her hand when she returned the bottle to him. The defendant then told the witness that he would give her ten dollars if she would "give him some." Witness refused. Defendant then pulled the witness up to him and told her that he would give her a hundred dollars if she would consent; that he was a railroad man and had plenty of money. Witness again refused, telling the defendant, who was showing her money, that she did not want his money. The witness then succeeded in releasing both hands, and she and the boy ran off towards Mr. Harris's house, which stood on the street. The defendant pursued and caught the witness just as she reached Harris's fence. He pushed her up against the fence, and again proposed to pay her if she would consent to copulation. Witness and the boy went through Harris's gate on to his gallery to escape the defendant, and saw the defendant pass on down the street. Witness saw no one at Mrs. Nelson's store, or at Harris's house, though she saw a dim light in the latter building.

Witness and the boy remained on Harris's gallery some minutes, until they thought that the defendant had gone. They looked around for him, and, not seeing him, came out and started along a road that ran diagonally through the space where the stock yards were once located. At this point the road intersected a street which led into town. When they had crossed the street and started across the stock pen, the witness looked around and saw the defendant as he rose up from the ground at the corner of Harris's fence. The defendant started in pursuit, running at his best, and the witness and the boy ran, screaming, and still pursued by the defendant, until they encountered Mr. Whittle on the road intersecting the street near Mrs. Potts's. Defendant pursued until he came within eight or ten feet of witness, the boy and Mr. Whittle, when, seeing Whittle on horseback with a gun, the defendant turned and ran in another direction. About this time, the witness's step-father, Mr. Warner, came up with a basket containing purchases, and asked what was the matter. On being told, Warner sat his basket down and ran after the defendant. Witness saw the defendant again that night. He was the same man she saw at Mrs. Nelson's store, the same man who pursued her, the same man who was now on trial. She had never seen that man before that night.

Witness did not cry out or give any alarm in the street near Mrs. Nelson's store. She saw a light in that store, but saw no

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person in it. She gave no alarm at Harris's. She saw no person at Harris's. She did not give any alarm until she was pursued the last time by the defendant. She gave no reason for not doing so, though she was asked by counsel. The defendant did not throw her down at Harris's fence, nor did he lift up her clothes. He only put his hand on her as she ran. The witness said that she knew what the defendant meant when he asked her to "give him some," but declined to answer how she knew.

Henry Carswell testified, for the State, that he was eight years old. Ida Kreig came to the house where the witness lived on the night of the alleged offense, and asked him to go with her to town, and the two went together. They saw the defendant in the street near Mrs. Nelson's store. He is the same man who pursued witness and Ida across the stock pen grounds.

J. O. Whittle was the next witness for the State. He testified that he had been hunting on the day of the alleged assault, and left the duck pond, about eight miles distant from Palestine, near dusk. He rode in quite a brisk walk until he reached the suburbs of town when he checked up to a slow walk. Witness reached the stock pen grounds at the point where the road crossing it diagonally intersects the street which runs north and south by Mrs. Potts's residence, between eight and nine o'clock. As witness was crossing the stock pen grounds, and nearing the street last mentioned, he heard the voices of children screaming. Supposing the parties to be children at play, the witness at first paid no attention to the screaming. The voices coming nearer and nearer and sounding more like children in fright, the witness stopped his horse and turned in his saddle to see what was the matter. Ida Kreig and Henry Carswell about that time came running and screaming toward the witness who was then holding his gun muzzle up, the breech resting on his thigh. At the same time witness saw a man stop suddenly, and then run off rapidly in a northerly direction. He had approached within ten, fifteen or twenty steps of the children. The children appeared to be very much frightened, excited and nearly out of breath. Witness asked Ida what was the matter and she replied that the man was after her. About the same time Mr. Warner, Ida's step-father, came up, and being informed of the assault, and being directed to the man who was then running off, but in sight, he sat his basket on the ground, requested witness to stay with the children, and started in pursuit. The witness went home with the children, and there saw the defendant in charge of a

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policeman. The witness had never seen the defendant before that night to know him, and could not swear that he was the same man he saw running after and off from the children a short time before. The children caught up with witness about one hundred yards from where witness first heard them screaming. The witness described the topography of the stock pen grounds. Chas. Finger lived in a house about sixty feet east of Harris, and parties lived east and west of Finger. The distance between Harris's house and Nelson's store is about one hundred yards. There was a light in Nelson's store, and the door was open. Witness did not remember that he saw anybody in the store as he passed it. He did not see the children as he passed that store. If the children were in Harris's yard or on the street near the house when the witness passed, they would have been too far to witness's left to be noticed unless they made a noise. Witness heard no noise on the street and saw no other persons than the persons mentioned.

W. B. Warner was the last witness for the State. He testified that he was the step-father of Ida Kreig. He knew the defendant, C. H. Thomas. Defendant was a married man, and in November, 1883, lived near the witness. The witness heard the children screaming on the evening in question, and, thinking he recognized Ida's voice, went rapidly to the point from whence the sounds came. He there found Ida, Henry Carswell and Mr. Whittle. Asking what was the matter, Ida told him that a man was after her, and pointed out the retreating figure of a man. Witness pursued instantly, keeping the man constantly in sight, until he overtook him after a chase of about two hundred yards. The defendant was the same identical man who was pointed out to him by Ida Kreig as the man who had pursued her. The State closed.

Lively Jowers, a colored woman, was the only witness introduced by the defense. She testified that, crossing the stock pens on her way home from work, on the night in question, she heard children screaming, and turned and looked toward the point from where the screaming seemed to come. She then saw Ida Kreig and Henry Carswell running and screaming. At the same time she saw the defendant, whom she knew well, standing at the corner of Mr. Harris's fence. He did not move while the witness was looking at him. Thinking nothing was wrong, the witness started on. She walked some distance before she looked back again. When she did look back all the parties

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were standing just as they were when witness first saw them. Defendant was then dressed in dark clothes and hat. He had two bottles, resembling soda water bottles, in his hands. It was a moonless but bright star light night. The witness and the defendant were about two hundred yards apart.

The motion for new trial presented, among other grounds, the issues discussed in the opinion.

*Gammage & Gregg* and *T. J. Williams*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** 1. To authorize a conviction of the offense of assault with intent to rape, it devolves upon the State to prove satisfactorily such *specific intent*. That particular intent, no other, will make this offense. Thus an assault with intent to have an improper connection with a woman, but without the use of *force*, and not without the consent of the woman, would not be an assault with intent to rape. (*Pefferling v. The State*, 40 Texas, 486; *Curry v. The State*, 4 Texas Ct. App., 574.)

In explaining to the jury the law of assault and assault and battery, the learned judge in one paragraph of his charge says: "Any unlawful violence upon the person of another with intent to injure such person is a battery, and where violence is actually committed upon the person of another, no matter how slight, it rests with the person inflicting the injury to show the accident or innocent intention." This portion of the charge is assigned as error, and was made a ground of defendant's motion for new trial.

Whilst the paragraph is in almost the exact words of the Code (Penal Code, Art. 485), and in the abstract is unquestionably correct, still we think it was error to give it in this case. The burden was upon the State to show, beyond a reasonable doubt, that defendant committed the assault, and that he committed it with the specific intent of raping the person assaulted. He might have committed the assault and injury with some other intent than that of rape, and if so, certainly he could not be convicted of this offense because he failed to show that his other intention was an innocent one. Suppose he assaulted the girl with intent to *persuade* her to have carnal intercourse with him, but with no intent to *force* her to such carnal intercourse; he would not be guilty of an assault with intent to rape, and yet he

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would be unable to show that he committed the assault with innocent intention. This charge instructed the jury that it devolved upon the defendant to show his innocent intention. His innocent intention of what? Of persuading, or of forcing the girl to have carnal intercourse with him? Considering the charge as a whole, we understand that it only devolved upon the defendant to show his innocent intention as to the rape in order to relieve him of this charge, but we very much doubt whether the jury so understood the charge. It is quite probable, we think, that they understood it to devolve upon the defendant the burden of proving an innocent intention of committing any offense or wrong upon the girl.

But, however it may have been understood by the jury, we think it was wrong to give it, because it shifted the burden of proof from the State to the defendant upon an issue, the affirmative of which the State was bound to prove beyond a reasonable doubt. There are instances where it is proper to thus shift the burden of proof, and where it would be proper to instruct the jury in this manner; but this case does not present such an instance. (*Jones v. The State*, 13 Texas Ct. App., 1; *Curry v. The State*, 4 Texas Ct. App., 574.) We think this error in the charge was calculated to mislead the jury to the prejudice of defendant's rights, and it is therefore such error as demands a reversal of the judgment. In all other respects the charge of the learned judge is a clear, forcible and correct exposition of the law of the case.

2. Considering the whole evidence as presented by the record, the case, to our minds, is a singular one, if the defendant's intention was to commit a rape. We think the evidence is unsatisfactory as to such being his intention. In view of the meagreness of the evidence tending to establish this specific intent, and of the alleged newly discovered evidence, we think the court should have granted defendant a new trial.

The judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered June 14, 1884.

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[No. 3203.]

## EX PARTE W. W. PACE.

**HABEAS CORPUS—EVIDENCE.**—See the statement of the case for evidence in a habeas corpus proceeding for bail under a charge of murder, *held* insufficient to authorize the refusal of bail.

**HABEAS CORPUS** on appeal from a judgment refusing bail on a hearing in chambers by the Hon. T. B. Wheeler, judge of the twelfth judicial district. The appellant was held under a *mitimus*, issued by a justice of the peace, charging the murder of William Gilson.

The case was opened by the submission of the testimony adduced on the examining trial. A. J. Roy was the first witness sworn for the State on that trial. He testified that the deceased was shot by some one, he did not know who, in witness's saloon in Sweetwater, on the night of May 7, 1884. Witness, who had been standing behind his bar, had just got into a back room, some twelve or fourteen feet from the entrance of the bar room, when the shooting commenced. The defendant, the deceased, old man Edmond and Mr. Cooksey were in the bar room when the shooting occurred. Deceased was standing three or four feet from the end of the bar, leaning on the counter, talking with Cooksey. The defendant was standing still, between the east end of the pool table and the southeast door. Witness went back into the bar room as soon as the shooting was over, but saw no one there but the deceased, who was reeling. Witness saw no one go out of the bar room.

A short time before the shooting began, the defendant stepped up to the bar, asking Cooksey what he would take to drink. Cooksey declined to drink, and the defendant then said that he would drink nothing. Defendant thereupon stepped back from the bar, and Cooksey turned and spoke to the witness, saying: "Al, Mack told me to say to you that he would not be back until morning." Gilson, referring to Mack, said: "D—n him, he is down on the street drunk." Cooksey replied: "No, he is not; he has gone to Abilene. I went to the train with him, and he told me to tell Al. that he would not be back until morning."

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\* Gilson replied: "Jim, I would not believe you nowhere." To this Cooksey replied: "You do not have to believe me." Gilson said: "It is just this way: In shaking dice, gambling, or anything of that kind, I would not believe you at all. If you was to give me your honor and tell me anything, I would believe you as quick as any man in the world." Cooksey said in reply: "I haven't got any honor, and you don't have to believe me. I think I am the fastest man in Sweetwater." Witness started out of the room at this time, and as he was going heard Gilson say: "I did not aim to insult you." Cooksey said: "You have thrown that up to me often enough. You are always throwing up to me that you would not believe me." The defendant did not change his position as the witness went out, that the witness noticed.

On cross-examination, the witness described the construction of the house in which the homicide occurred, as follows: There were two doors in the front end of the building, one a single door, near the southeast corner, and the other a double door, about the centre. There was a window near the northeast corner of that end. The bar room was eighteen by twenty or eighteen by twenty-two feet in size. The bar counter was on the north side, and near the east end. The pool table stood about the center of the house, but a little nearest the south wall. The east end of the pool table was about ten feet from the east wall. From that end of the pool table to the southeast door, the distance was about ten feet. That door had a common panel shutter or screen. There were two such shutters to the double door. They all swung open to the inside.

When witness went out of that room Gilson was standing three or four feet from the east end of the bar and seven or eight feet from the east wall; Cooksey was west of Gilson and near the centre of the bar, and the defendant stood to the left of Cooksey, some twelve or fourteen feet from the east and about opposite the west end of the pool table. Just after he and Cooksey refused to drink, the defendant moved away toward the southeast door and corner. That door was closed. Considering the positions occupied by the defendant and Cooksey, egress through the southeast door was the safest for a man who expected Cooksey and Gilson to go to shooting. Defendant seemed to be in a good humor, and spoke kindly when he invited Cooksey to take a drink. Witness did not know whether or not he



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included Gilson in the invitation. Witness had known the defendant about Sweetwater for two or three weeks.

On re-direct examination the witness stated that he did not know the character of business pursued by the defendant in Sweetwater. He did not know whether or not the southeast door was fastened when the shooting occurred. Witness could not say exactly how many, but thought six or eight shots were fired, nor could he say whether but one or two pistols were fired. Witness had examined the shot holes in the house and was satisfied that they could not have been made by a pistol fired by the hand of a man shooting from the position occupied by the defendant when the witness left the room. The deceased changed his position while the witness was in the back room. Witness saw blood all around the pool table. All of the shot holes discoverable were in the east, west and south walls. When witness came back into the bar room, the deceased was between the bar and the pool table, and nearest the east wall. He fell just as the witness came back. Witness did not know whether or not he then had a pistol. A. J. Whitsel was the first man, after witness, who entered the bar room after the shooting.

Re-crossed, the witness said that he did not know whose body supplied the blood he saw around the pool table. When the witness returned the deceased was four or five feet south or southwest from where he was when witness went out, but was still north of the pool table. The defendant could not, in the position he occupied when witness left, have shot the deceased in his changed position and made the holes in the wall.

A. J. Whitsel's testimony was next read by the State. He testified, in substance, that he was in his house, nearly opposite Roy's saloon, on the evening of the homicide. Between seven and eight o'clock he heard first one, and after a slight interim, three or more shots fired in rapid succession. Another short intermission preceded two or three more shots. During the firing of the second volley the witness heard one ball strike Dulaney's house, and immediately another strike his own house. About the time that the firing ceased, the witness heard Gilson speak in Roy's saloon, and started across to the saloon. When witness got within ten feet of the saloon he saw a man step from the walk into the moonlight with a pistol in his right hand, which he presently stuck down the left side of his pants. The man then walked rapidly down the street toward the Palace hotel. That man, the witness thought, was the defendant.

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When this man had reached a point just below the Central hotel, sheriff Bardwell came up and asked witness what was the matter. Witness replied that Gilson was shot, and, pointing to the retreating figure of the defendant, said: "There goes the man who did the shooting." Bardwell followed the defendant, and witness went into the saloon. He found Gilson on the floor, struggling to get up. Witness asked Roy to get a drink of water and a blanket on which to remove Gilson to the hotel. On raising Gilson up, the witness found a pistol under his head or neck. This pistol witness kept in his hand until he delivered it to Bardwell, with the exception of a moment at the Palace hotel, when Harry Hord examined it. One chamber of the pistol had been discharged. The next time the witness saw the man, or the person he took to be the man who stepped out of Roy's saloon with a pistol in his hand, was in the court house. Witness could not positively identify the defendant as that man, but he looked like him. The pistol he had in his hand on leaving the bar room was a bright, new looking weapon.

Cross-examined, the witness stated that he did not leave his house until the shooting ceased. He saw no one fire a shot, but saw smoke emerging from the bar room double door through the latticed shutters. The man who passed out pushed the shutters open from the inside. He did not ask the witness which way Cooksey went. Witness saw no one but that man at the time, and at no time saw old man Edmond go out of the saloon. When witness asked Gilson if he was hurt he, Gilson, said: "I will get over it."

The testimony of sheriff Bardwell was next read by the State. His statement was, in substance, that as soon as he heard the shooting, he ran from his house to Roy's saloon, near which he met Whitsel, and asked him what was the matter. Whitsel replied that Gilson was either killed or badly wounded, and pointed to the retreating figure of a man, who he said did the shooting. The witness followed and overtook the man, who proved to be the defendant, just as he stepped on the gallery of Johnson's saloon. He arrested the defendant, after telling him that he was sheriff. He asked defendant if he was armed, and the defendant said that he was not. Defendant requested permission, and was allowed, to step into Johnson's saloon to see Johnson. Johnson was not in, and witness took the defendant to the front of Roy's saloon and stopped, when some one said: "That man is armed." Witness found a pistol stuck down be-

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tween the waistband of his pants on his left side, and said to defendant: "I thought you told me you was not armed." Witness then took defendant to jail. Defendant's pistol was a forty-five calibre, white handled, nickel plated Colt's revolver. Three shots had been recently fired out of it. The cartridge shells were still in the unloaded chambers.

J. D. Dulaney's testimony was next read. His statement was, in substance, that the defendant came into his store house on the night of the shooting, a short time before it occurred, and said that he wanted to exchange pistols with the witness for the night, as his was too long to carry in his pants. Witness told him he had only new pistols. Defendant said that he would not harm it in any way, and would return it next morning. Witness then got a new white handled, nickel plated Colt's forty-five calibre revolver, which, on request of defendant, he loaded and handed the defendant. Defendant gave witness his pistol, and went out. Within five or ten minutes, the witness heard shooting in Roy's saloon. Two or three bullets fell on witness's gallery. After the shooting, witness walked over to Roy's saloon and saw Gilson. He was down and shot. Witness then noticed but one wound on the body, about two and a half inches below the left nipple, but afterward examined and found four wounds on the body, the one described, one below it several inches, one in the right side, and one in the left wrist, all passing entirely through. Witness afterward saw the defendant in front of the saloon in sheriff Bardwell's custody. Six or seven shots were fired in all, and the witness thought that more than one pistol was used. Witness knew nothing about who did the shooting. Two or three parties were in witness's store when defendant came in and exchanged pistols. Witness afterward got his pistol from Bardwell.

F. G. Thurmond testified that he and defendant were together in Gray's saloon on the evening that the homicide occurred. While teasing candidates who had been defeated at the recent city election, the defendant, speaking of pistols, said to witness: "I have two; I will stake you with one." The defendant did not give the witness a pistol. Witness had no recollection of ever having seen the defendant with a pistol. The conversation alluded to occurred about sundown. The parties were all drinking somewhat, but the defendant spoke in a jocular, good humored tone. Witness made a statement before the coroner's jury, which, unless he made some mistake, and he thought that

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unlikely, was true. That statement, by consent, was read in evidence. It was, in substance, as follows:

"The witness, old man Bradley, Fred. Beall, J. R. Moore, — Friday, Jim Cooksey, W. A. Gray and H. C. Hord were present at W. A. Gray's saloon on the evening of the homicide, before it occurred. After some one treated, the crowd passed out of the saloon to the porch. About that time Gilson, the deceased, came up. Gilson said to witness: 'You voted for Bough. You are a cute one. I am going to put you in the penitentiary (or I will bet you are in the penitentiary) in fifteen months.' Witness proposed to Moore to go up the street with him, when some one laughed and asked: 'Thurmond, did you hear that?' Gilson replied to the party: 'Yes, Thurmond heard it, and he understands it.' Witness answered: 'Oh, I don't think he means it.' The defendant said: 'Old Gilson asked me if I was not a secret detective, and I don't like him any way. I have got two (putting his hand to his side), and will stake you with one.' Witness wanted not to take it (a pistol?), and said: 'Come on, let's go and take a drink.' Defendant made some rough remark as Gilson walked across the street. The witness then went to the postoffice, where he saw Cowan, and told him the substance of what Gilson said, and that Gilson was 'tight.'"

W. C. Johnson testified, in substance, that on the night of the homicide, Gilson, defendant, Cooksey and Seaton were in his saloon. Gilson was talking to Seaton about the election. Defendant remarked that Gilson had given Thurmond a "racket" over at the other saloon (Gray's), and that Thurmond having no pistol, he, defendant, let Thurmond have his. This occurred about eight o'clock in the evening. Defendant appeared to be in his usual good humor.

J. W. Anderson testified that five or ten minutes before the shooting, the defendant and Cooksey left Johnson's saloon, laughing and talking in a pleasant, good humored manner.

W. C. Cummings, proprietor of the Central hotel, testified, in substance, that Roy's saloon was up the street from his, witness's, place. Johnson's saloon was down the street. A short time before the shooting, the witness saw a man he took to be the defendant pass his house, going up the street, and shortly saw him return, going down the street. Within a few minutes he saw the same man and Jim Cooksey pass up the street together, and presently he heard the shooting. Immediately after the shooting the defendant passed witness's house, going down

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the street, and witness asked him who was hurt. Defendant replied that he did not know.

Fred. H. Beall testified that he saw the defendant at Gray's saloon between sundown and dark on the evening of the homicide. He said something about Gilson—something to the effect that Gilson appeared to be out of humor, and that he, defendant, did “not fancy his, Gilson's, ways, and did not like him.” Thurmond was not then present. He had just left.

Tim. Flannery testified that just before the shooting commenced he was standing outside at the window, looking in at Roy's saloon. Gilson, Roy, defendant and Cooksey were in the saloon. Roy and Cooksey were talking, when Gilson said something, to which Cooksey replied, in substance, that Gilson need not believe him if he did not want to. Motions of the party indicated a fight, and witness went from the window to the stable across the way. As he left, Cooksey seemed to be reaching for his pistol, and Gilson seemed to be “going for” Cooksey. A shot was fired just as the witness turned from the window, and the bullet whistled by the witness. Witness did not see the discharge of any shot. Gilson was standing with his back to the window, his elbow on the counter, and his hand up to his face. Cooksey was at or near the far end of the counter. The defendant was some little distance out from the counter and between (about midway) the other two. Two shots were fired with some little intermission, and the others rapidly. Witness did not count the shots. Cooksey went out of the saloon first, and went up by Simpson's store. Defendant came out of the saloon very shortly afterwards, and went down the street, or maybe across the street. Cooksey said something when he left the saloon, but witness did not understand him.

H. G. Bardwell was again sworn. He stated that after the shooting Whitsel gave him a pistol, which he instantly and positively recognized as one used by Gilson ever since he, Gilson, had lived in Sweetwater. The pistol had one empty chamber, but witness did not think it had been lately discharged.

T. E. Dauthitt, county clerk, testified that he took the dying statement of the deceased. After the statement was made, deceased was asked several questions about the difficulty, and among them, witness thinks, whether or not the defendant was present and had anything to do with the trouble. He said, as well as witness remembered, that the defendant was present, but that Cooksey did the shooting. Witness did not think the

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deceased said anything in his hearing implicating the defendant.

Edmond Dorch testified that he was in Roy's saloon just before the shooting occurred. He saw no one in there but Roy, Cooksey and deceased. Witness just got into his own door, six or eight feet distant from the saloon door, when the first shots were fired. He met Lon Barron going into the saloon as he went out. He first saw the defendant, a few minutes after the shooting, about the middle of the street, between the houses of witness and Dulaney. Witness saw no pistol about the defendant.

The substance of the testimony of Thomas Barron was that he went into the saloon just before the shooting commenced, meeting the negro Edmond Dorch, and one or two other persons going out. He saw Cooksey and the deceased near the bar talking, and a man near the billiard table, whom he supposed, though by no means certain, was defendant. That man said nothing and did nothing that witness saw, and displayed no pistol that witness saw. Witness got out of the house just as soon as he could, when the shooting commenced, without stopping to count the shots or to see who was shooting. Two men, in his opinion, did the shooting. He thought the discharges were too rapid to have been fired by one man.

Frank Baugh's testimony was in substance that when defendant first came to Sweetwater he sent for witness and exhibited his papers of appointment as a deputy sheriff and police officer, from the sheriff of Travis county, and the Adjutant General of the State. He said he was hunting some men charged with offenses. Witness knew one of the men, but did not know his whereabouts. Defendant told witness that he did not want his business known. Sheriff Hornsby, of Travis county, subsequently told the witness that if he got defendant out of this trouble he was going to retain him in his service.

The substance of the *ante mortem* statement of the deceased was that he told Cooksey he would take his word about any thing but gambling; that Cooksey replied: "You have said enough about that, and I am tired of it," and stepped back and drew his pistol; that he, deceased, caught the pistol and held it while Cooksey shot him four times; that at first he could have killed Cooksey if he had wanted to. That he drew his pistol but did not fire a shot. One chamber of that pistol was empty, but

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was not fired that night. That he was "jabbed" by the whole party. That his death and "removal" was very much desired, as he knew too much about the career of Cooksey and Jep Clayton. That Bill Gray, Cooksey and Clayton had bribed, or at least they thought they had bribed him, to leave Colorado, when Clayton was in trouble. Witness habitually drank a great deal of whisky, but never got it "above his collar." He repeatedly asserted that his death and removal was desired by "them," because of his knowledge of the crimes of others. That he had been an officer for twenty-eight years, and had never broken the law. He had used some sixty dollars of the bribe money which, though it came from Clayton, was paid to him by Bill Gray. He had put a cipher on a ten dollar bill he received of that money, which bill was now in Charley DuBose's possession for preservation.

The substance of the testimony of W. C. Johnson was that he was present when the deceased made his statement just before his death. Some one asked him, deceased, in substance, if the defendant had anything to with the shooting. Deceased answered that Cooksey shot him. Throughout his statement he declared that Cooksey did the shooting. Witness did not hear him mention the defendant's name. Witness had known the deceased for seven or eight months. He had know the defendant since he came to Sweetwater, some two or three weeks before the shooting. He saw the two together very often. They appeared to be on the best of terms. Witness had never noticed the least evidence of hard feeling or malice between them. They were together in the witness's saloon on the evening of the shooting, and appeared perfectly friendly at that time.

The appointment of the defendant as deputy sheriff of Travis county, by M. M. Hornsby, sheriff, and his qualification as such, certified by the district clerk, were next introduced in evidence.

The defense next introduced in evidence the following document:

"DESCRIPTION LIST.

"The bearer is a member of Company B, Frontier Battalion. Name: W. W. Pace. Rank: Orderly. Age: Twenty-four. Height: Six feet. Color of hair: Dark. Color of complexion: Fair. Where born: Austin, Texas. Occupation: Sheriff. En-

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listed when: April 18, 1884. Enlisted where: Austin, Texas.  
Enlisted by whom: W. H. King, Adjutant General.

“AUSTIN, TEXAS,

“April 18, 1884.”

“W. H. KING,

“Adj’t Gen’l.

“NOTE.—This description list, for identification, will be kept in possession of the ranger to whom it refers, and will be exhibited as a warrant of his authority as such, when called upon, and must be *surrendered to his company commander when discharged.*”

The defense next offered in evidence the following passes:

“ADJUTANT GENERAL’S OFFICE, STATE OF TEXAS.

“To agents and conductors of the International and Great Northern, Missouri Pacific and Texas Pacific Railways:

“Pass W. W. Pace, Company B, Frontier Battalion, from Austin to Fort Worth.

“Approved:

Austin, Texas, April 21, 1884.

“W. H. KING,

JOHN O. JOHNSON,

“Adjutant General.

Q. M. Frontier Battalion.”

The second pass was similar. and called for passage from Fort Worth to Sweetwater and return.

D. C. Pace, the brother of the defendant, testified that the defendant’s estate did not exceed four hundred dollars in value, and that he could not give excessive bail. This concluded the evidence taken before the examining court, and reduced to writing. The judgment of the examining court, remanding the defendant without bail, was next read.

Thomas E. Dauthitt was placed upon the stand by the applicant. He testified that he was at present county clerk, and had resided in the county of Nolan since 1881. He knew the people who had resided in Sweetwater during that time. Deceased had been about Sweetwater about six months when killed. Witness saw the defendant for the first time on that night, just after the shooting. He was then standing in front of Roy’s saloon, in the custody of the sheriff. Witness took a pistol from the defendant and gave it to the sheriff. Three chambers had been recently discharged. Witness did not know whether the deceased and the defendant were personally acquainted with each other. In speaking of his troubles as a peace officer, the deceased had



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spoken of Cooksey. Witness knew Cooksey. He saw a man he took to be Cooksey running, just after the shooting, and has never seen Cooksey since. He saw Cooksey's wife and children take the west bound train about a week after the homicide.

J. W. Germany was the next witness for the applicant. His testimony was confined to a description of the wounds on the body of the deceased. The wounded hand of the deceased, and his coat, where one ball entered the breast, were powder burned.

The testimony of W. C. Johnson, the next witness, did not vary materially from his testimony as adduced before the examining court. He had never known of hard feelings between deceased and defendant, or between deceased and Cooksey, and did not know whether or not deceased was a witness against Cooksey and Clayton for assault with intent to murder in Nolan county.

F. G. Thurmond, the next witness placed on the stand, repeated his former statement somewhat more in detail. There was no material discrepancy between his present statement and his statement reduced to writing at the examining trial. He had understood that Clayton and deceased were at enmity. Cooksey and Clayton were related by marriage, and were intimates and business associates. So far as he knew, deceased and Cooksey were friendly. He had seen the two together often, and had seen them drink together. When the defendant made the remark, "I have two and will stake you with one," the deceased must have heard it; witness is satisfied that he did, but he took no notice of it. Parties at the time were being teased over defeats for town offices. Such talk as that they would have to go out and herd sheep was indulged. Some of the parties seemed to get mad. Witness was retained as counsel for Clayton and Cooksey in their pending trials for assault to murder, and the deceased's name was appended to each indictment as a State's witness.

The defendant then introduced in evidence an indictment against Cooksey, charging him with an assault with intent to murder S. P. Hardwick, to which the names of deceased and Hardwick were appended as State's witnesses; also an indictment against J. L. Clayton, charging him with an assault with intent to murder W. C. Gilson, the deceased, to which the names of the deceased and others were appended as witnesses.

A. J. Roy was next introduced and sworn for the applicant. His statement concerning the shot holes in the walls was as fol-

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lows: "There were five bullets shot into the walls of my saloon during that difficulty. One ball went through the west wall, about six feet from the floor, ranging a little upwards. Two balls went through the south wall—one about eight feet east of the southwest corner, and about two and a half feet above the floor. This ball struck the wall at about an angle of sixty degrees. The other bullet struck the wall about nine feet from the floor, about the center of the room, and ranged a little up. The shot was evidently fired by some one standing about the center of the bar. The shot that struck the west wall was evidently fired by some one standing about twelve feet from the west wall and near the east end of the pool table, and probably five feet from the bar. The bar and pool table are about ten feet apart. Two shots struck the east wall—one about five and a half feet above the floor, and about three feet from the southeast corner, and was evidently shot by some person standing some distance from the east wall, and north or northwest from the northeast corner of the pool table. The other shot through the east wall was about two feet above the floor, and five feet from the northeast corner, and near the east end of the bar. That shot was fired by a person standing near the bar and west of where it struck. These estimates of where the parties shooting stood are made from the general range indicated by the bullet holes."

Thomas E. Dauthitt was called by and testified for the State. He and others were standing in Taylor's drug store, nearly two hundred yards north of Roy's saloon, when the shooting occurred. As soon as the shooting was over, witness and the party stepped out to the gallery. Witness then heard, and partially saw, a man running from the scene of the shooting. When the man got near the north side of Simpson's store, he hallooed back: "Now, G—d d—n you, I got there, Eli." Witness thought then, and thinks yet, that that man was James E. Cooksey. Cooksey then lived east of Roy's saloon, and east of where the witness saw the man running.

H. C. Hord testified that he was present when Gilson made his dying statement. Deceased was asked in substance if Pace, the defendant, was present when the shooting occurred, and answered in substance that if the defendant was present, he, deceased, did not see him.

J. F. Otey testified that a short time before the shooting he was in Dulaney's store, when defendant came in and exchanged

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his long pistol with Dulaney. He told Dulaney that his was too long and he wanted a short one that he could shoot quickly. Dulaney loaded the new pistol, handed it to the defendant, who left his long pistol and went out. The shooting occurred within the next five minutes.

Joseph Boone located himself in the neighborhood of Simpson's store about the time the shooting ceased. Shortly afterwards he heard a man running, and heard him say: "By G—d, I got there, Eli." He expressed no opinion as to who this party was.

L. J. Otey was again put on the stand and testified, in substance, that he saw defendant and Cooksey together a great deal on the day of the killing. They were together so much that the witness's attention was particularly attracted. From where the witness was at work on a scaffold at a new house, he saw the defendant and Cooksey go off together behind a shoemaker's shop and stay some time in close conversation. He could hear nothing they said. He saw them together that evening at Gray's saloon, after the election was over. The feeling between Gilson and Cooksey, when the former first came to Sweetwater, was not good, but witness thought they had got on better terms before the shooting. Witness had heard Cooksey speak lightly of Gilson. He had heard him say that he thought Gilson had been brought to Sweetwater to kill somebody. It was some time after dinner that witness saw Cooksey behind the shoemaker's shop.

W. A. Gray testified that during the afternoon of the day on which Gilson was killed, he, defendant, Cooksey, Moore and some one else took a drink of whisky from a bottle provided by some one in the rear of the shoemaker shop. Otey had been at work on a house near by, but witness did not know whether he was working there at that time or not.

Jeff. Dulaney testified that he and several others were deputized by the sheriff to look for and arrest Cooksey on the night of the shooting. They searched that night and several other days and nights, but never found him.

It was admitted by the State that Gilson's authority as deputy sheriff had been revoked about two weeks before the shooting, and by the defense that for several months up to that time he had been a duly authorized deputy sheriff.

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Syllabus.

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*Cowan & Posey, and Rector, Moore & Thompson, for the appellant.*

*J. H. Burts, Assistant Attorney General, for the State.*

WHITE, PRESIDING JUDGE. This is an appeal from the judgment of the Hon. T. B. Wheeler, judge of the twelfth judicial district, rendered in chambers, in vacation, refusing bail on an application for bail under a writ of *habeas corpus* made by applicant, this appellant, who was charged with the murder of one William Gilson. We have maturely considered the voluminous record sent up on this appeal, and in our opinion the court erred in refusing bail. Wherefore said judgment is reversed, and appellant will be admitted to bail upon his execution of bond, with good security, in the sum of eight thousand dollars, conditioned as the law directs.

*Reversed and bail granted.*

Opinion delivered June 14, 1884.

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[No. 3208.]

EDGAR ROSS v. THE STATE.

1. BURGLARY—INDICTMENT.—See the opinion *in extenso* for an indictment for burglary held sufficient to charge the offense.
2. SAME—DEFINITION OF "ENTRY"—CHARGE OF THE COURT.—In a trial for burglary the trial court charged the jury on the subject of "entry" as follows: "It is not necessary that there should be any actual breaking to constitute the offense of burglary, when the entry is in the night time. An entry into a house in the night time, without the consent of the owner, or some other person authorized to give consent, with intent to commit a theft, is an entry by force, as meant in the law." Held, error; that to constitute burglary the entry must be by "force," "threats" or "fraud," whether committed in the day time or night. The definition of entry in Article 706 of the Penal Code, which makes it to include, within the meaning of Article 704, every kind of entry but one made with the free consent of the occupant or of one authorized to give such consent, does not eliminate from the offense the element of force, nor dispense with the necessity of alleging and proving an entry by force. But if the entry is at night, the slightest force suffices.

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Statement of the case.

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3. **SAME—POSSESSION OF RECENTLY STOLEN PROPERTY—BURDEN, OF PROOF.**—The explanation of a defendant when first found in possession of stolen property, if reasonable, imposes upon the State the burden of proving its falsity.
4. **SAME—FACT CASE.**—See the statement of the case for evidence *held* insufficient to sustain a conviction for burglary.

APPEAL from the District Court of Walker. Tried below before the Hon. J. R. Konnard.

The conviction in this case was for the burglary of the house of J. L. Smith, with the intent to commit theft. A term of two years in the penitentiary was the penalty imposed.

J. L. Smith was the first witness for the State. He identified the defendant on trial as Edgar Ross, the party charged in the indictment. About two years prior to this trial, the witness was operating a steam grist mill at his mill property in the town of Huntsville, and at the same time a kind of junk business, buying old scraps of brass, iron, rags and bones. His mill was near the railroad depot, fronting on a public street in the town of Huntsville, and on the railroad's right of way. On one occasion the witness missed a brass kettle, a brass "bearing," and other articles, including a brass pump, from his mill. These articles belonged to the witness, and were taken without his consent.

J. D. Clarke had a steam mill about three or four hundred yards distant from the witness's mill, and on the opposite side of the depot. He likewise was engaged in buying scrap iron and brass. A short time after the witness missed the articles named, he went to Mr. Clarke's mill and made inquiries about them. Mr. Clarke readily permitted witness to examine his scraps. Among them witness found, in ten or a dozen pieces, about fifty pounds of brass scraps belonging to him. Two or three weeks prior to this, the witness lost the key to his mill, and had another key made, and locked his door every night. When witness began to miss articles, he became satisfied that some person was in the habit of entering his mill at night and removing articles. To ascertain whether or not this was true, he arranged a trap one night, by attaching a string to a tin can, and so placing the can that any one entering the mill by opening the door would throw the can down. On the next morning, the witness found his door locked, but the can thrown down. The witness then had a new lock put on the door, after which he missed no more articles. Witness had a part of the brasses back under a bench on

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Statement of the case.

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the sill of the house. The defendant was very frequently about the witness's mill. Some time before the can experiment, and very early in the morning, the witness saw the defendant running from the direction of his mill. The trap experiment described was on or about May 10, 1882. Meal and corn, as well as brass, was taken from witness's mill before the new lock was put on. On the morning after the new lock was put on, the witness discovered foot prints about the door, and a place where some party or parties had urinated against the mill.

Cross-examined, the witness said that, at the time of the burglary, his mill was a public place. It was a common corn mill, operated by steam, in which the witness did grinding for the public. Witness had no hands to assist him, but did all the work himself. He was his own fireman, engineer and miller. He opened his mill at daylight, and closed and locked it about dark. Except at meal times and when called off by business matters, the witness was always at his mill during the day. The witness did not think that the articles missed could have been taken in the day time. He did not know that the defendant entered his mill, nor did he know when the missed articles were taken. They may have been taken three or four days before they were missed. When witness went to Clarke's mill, he found no one present but Mr. Clarke and his son William. Mr. Clarke delivered to the witness such articles as he could identify, and witness paid him the price that he had paid for them. Witness did not remember that, at the time he recovered the stolen goods from Mr. Clarke, he told Clarke he did not know when they were taken, and that they might have been taken at night or during the day while witness was engaged. At that time, a great many persons came about the witness's mill during the day. The witness did not think that the articles he recovered from Clarke could have been taken out during the day, inasmuch as the witness was satisfied that he would have detected any attempt in the day time, and, besides, they were deposited in a place inconvenient to be reached.

William Clarke was the next witness for the State. He testified that he remembered the occasion when J. L. Smith came to his father's mill, about two years before this trial, and claimed some articles of brass which witness and his father had previously purchased. He, Smith, recovered a brass kettle, a brass "bearing," and some other articles. This brass "bearing" the witness purchased a few days before from the defendant. This

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was the only article identified by the witness Smith which the witness could remember having purchased from the defendant. Witness bought the "bearing" from the defendant two or three days before, about eight o'clock in the morning, together with about twenty pounds more of old iron and brass.

Cross-examined, the witness said that when he made the purchase he asked the defendant where he got the bearing. The defendant said that he found it near the penitentiary. Quite a number of persons besides the defendant were engaged in the sale of scrap iron and brass at the time, and the witness and his father often purchased from them. Witness's father's mill was one of the most public places in the town of Huntsville.

The defendant's father was his first witness. He testified that the defendant was born on the sixteenth day of October, 1869.

J. D. Clarke was the second and the last witness for the defendant. He testified that he was the proprietor of Clarke's mill, near the depot, in the town of Huntsville, Walker county, Texas. He was acquainted with J. L. Smith, and remembered the occasion of Smith's visit to his, witness's, mill, about two years before this trial, in search of scrap brass, which he claimed to have missed from his mill. Among the articles Smith identified and claimed was a brass "bearing." Smith said to the witness that he believed that the party who took the "bearing" either had a key to his mill, and entered and took it at night, or else he took it in the day time, while he, Smith, was at work. Witness's son bought quite a quantity of brass about that time from various parties. Smith at the same time was engaged in the business of buying scrap iron and brass.

S. P. Montgomery was next introduced by the State, in rebuttal. He testified that George Ross, the father of the defendant, lived on his place during the years 1867 and 1868, and that the defendant was born while George Ross lived on that place.

Incorrectness of the charge of the court in various particulars, including that considered in the opinion, and the sufficiency of the evidence to support the conviction, were the grounds assigned for new trial.

*McKinney & Leigh, for the appellant.*

*J. H. Burt, Assistant Attorney General, for the State.*

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Opinion of the court.

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WHITE, PRESIDING JUDGE. This appeal is from a conviction for burglary. Two grounds were submitted in the motion to quash the indictment: 1. Because the indictment does not allege that the house charged to have been entered was in the county of Walker. 2. It does not allege that the goods and chattels intended to be stolen (after entry) were in the house alleged to have been entered, nor to whom said goods and chattels belonged.

The indictment filed in said cause is as follows: "In the name, and by the authority of the State of Texas of Texas; the grand jurors in and for Walker county, State of Texas, legally selected, drawn, tried, empaneled, sworn and charged at the May term, A. D. 1882, of the district court of Walker county, State of Texas, upon their oaths, in said court do present that Edgar Ross, in Walker county, State of Texas, on the tenth day of May, A. D. 1882, that is to say in the night time of said tenth of May, A. D. 1882, did by force break and enter the house of J. L. Smith, without the consent of said J. L. Smith, and with the intent to fraudulently take, steal and carry away from the possession of J. L. Smith and out of said house, goods and chattels of the value of five dollars, corporeal personal property belonging to J. L. Smith, without the consent of J. L. Smith, and with the intent to deprive said J. L. Smith, the owner of said goods and chattels, of the value of the same, and to appropriate it to the use and benefit of him, said Edgar Ross; against the peace and dignity of the State."

We think it is apparent that the objections are not well taken. If in Walker county defendant broke and entered the house of J. L. Smith, as is charged, we cannot well see how it was possible for him to do so if the house was not in Walker county. And the same may be said with regard to the allegation respecting the goods and chattels. It might, perhaps, have been better and more specific to have charged that the goods and chattels were in the house, but we are of opinion that the allegations are substantially sufficient as made, and that the court did not err in overruling the motion to quash.

One of the paragraphs of the charge of the court to the jury which is excepted to is as follows: "It is not necessary that there should be any actual breaking to constitute the offense of burglary, when the entry is in the night time. An entry into a house in the night time, without the consent of the owner, or



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some other person authorized to give consent, with intent to commit a theft, is an entry by force, as meant in the law."

This charge is erroneous. To constitute burglary, the entry must be by "force," "threats," or "fraud," whether committed in the day time or at night. (Penal Code, Art. 704.) This identical question is discussed in *Hamilton v. The State*, 11 Texas Court of Appeals, 116, and it was held that the definition of "entry" in Article 706, making it include in its meaning "every kind of entry but one made by the free consent of the occupant or of one authorized to give such consent," did not eliminate from the offense the element of "force," nor dispense with the necessity of alleging and proving an entry by "force." If the entry is at night, the slightest force to effect it will suffice.

We are of opinion that the evidence is not sufficient to support the verdict and judgment. Clarke, the party from whom Smith got the articles alleged to have been stolen from his mill, was only able to identify one of the articles, viz, "a brass bearing," as an article which he had purchased from the defendant. He states that when he purchased that "brass bearing" from the accused, he, Clarke, asked defendant where he had got it, and that defendant stated that he had found it up near the penitentiary. This statement of the defendant, made at the time he was first found in possession of the stolen property, was altogether natural and reasonable, when considered in connection with the other evidence in this case, and it devolved upon the State to show that it was false. (*Garcia v. The State*, 26 Texas, 209; *Galloway v. The State*, 41 Texas, 289; *Johnson v. The State*, 12 Texas Ct. App., 385.) This the evidence adduced by the State wholly fails to do.

For the errors indicated, the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered June 14, 1884.

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Statement of the case.

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[No. 3193.]

## DAVID TREADWELL v. THE STATE.

**HOMICIDE—EVIDENCE—FACT CASE.**—Homicide is the destruction of the life of one human being by the act, agency, procurement or culpable omission of another. See the statement of the case for evidence held insufficient to establish a homicide, and hence insufficient to support a conviction for murder in the second degree.

APPEAL from the District Court of Henderson. Tried below before the Hon. F. J. McCord.

The indictment in this case was filed on the fifth day of October, 1881. It charged the appellant with the murder of one G. R. Honeycut, in Henderson county, on the twenty-fourth day of November, 1875. The conviction was for murder in the second degree, and the punishment awarded was a term of five years in the penitentiary.

W. E. Honeycut was the first witness for the State. He testified that he was the father of the deceased, G. R. Honeycut. The deceased lived near the town of Goshen, in Henderson county, at the time of his death, and had a wife and two children. The deceased was shot just below his navel, on the twenty-fourth day of November, 1881 (?), and died the following September. Witness was not present at the time of the shooting, and did not hear of it until between nine and ten o'clock at night after it occurred. From the time he was wounded, until his death, the witness was with him constantly, except the short time he was with Doctor Cook in Athens, and about two weeks while he was under the treatment of a doctor in Kaufman county. The deceased never recovered from the effects of the wound; he never got sufficiently well to move or ride around generally. He rode to Doctor Gardner's place, a mile and a half or two miles distant, a time or two. He was taken to Doctor Cook in Athens, and from Athens home in a wagon, neighbors assisting witness to put him in the wagon. A thin skin would sometimes form over the wound, but on being pressed the wound would discharge. It was in May after he was shot in November that the deceased was taken to Doctor Cook in Athens. Deceased never performed any labor

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after he was wounded. After the deceased was taken home from Doctor Cook's he lay in bed constantly, except perhaps a time or two, when he rode to the house of Doctor Gardner. On such occasions the witness helped him get on his horse. At the time of his death, and for some time before, the deceased was badly swelled about the privates, and about the wound. Doctor Gardner was the last doctor to attend the deceased Doctor Rooks, now a resident of Smith or Cherokee county, was the first doctor to attend him. The deceased had a bloody action of the bowels a few days after he was shot. He remained at his own house for about one month after he was shot. He was removed to the witness's house by the witness on Christmas eve day.

Cross-examined, the witness stated that he had never seen or heard of Doctor Rooks since he attended the deceased. The deceased stayed with a physician in Kaufman county about two weeks, returned home, and was sent by the witness to Doctor Cook in Athens, where he stayed for two, three, or perhaps four weeks, and was taken home by the witness. When shot, the deceased lived about six miles from the house of the witness. Witness attended him there about a month, and then took him to his, witness's, house. If Doctor Johnson ever attended the deceased the witness did not know it. The deceased was not able to be up while in Goshen. It was about a week after he returned from Doctor Cook's before he rode over to see Doctor Gardner. The bloody action of the bowels spoken of occurred within two weeks after the wound was inflicted. He had other actions of the same character after he was moved to the witness's house. The deceased never had any disease other than the wound spoken of. The wound formed a running sore about the size of a dollar, and was a running sore until the deceased died. The parts about the abdomen and privates were swelled. Witness first observed this swelling after he took the deceased to Doctor Cook. Witness could remember but one visit the deceased made to Doctor Gardner, which was the only time Doctor Gardner treated him, though he may have sent medicine. Deceased had no doctor after witness took him to his, witness's, house, until he was taken to Doctor Cook in Athens, except the Kaufman county doctor. Deceased was never free of pain after he was shot; he was not diseased, and never had the dropsy or other disease before he was wounded.

William Melton was the next witness for the State. The sub-

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stance of his testimony was that he knew the deceased well in life. Before he was wounded he was in good health, and would weigh perhaps one hundred and forty-five pounds. He was of little or no account after he was shot, though he got so he could go around a little. He always afterwards complained of pain. He never performed any labor after he was wounded. The witness saw him in bed a few days before his death. He was then much swollen or bloated.

Cross-examined, the witness said that the deceased was shot during the month of November, 1875, and died in September, 1876. The witness saw the deceased walking around the house a day or two before he went to Kaufman county. If deceased was a diseased man before he was shot, the witness did not know it. The witness attended the deceased as a nurse only, while he lay at his own house, and then only at night. He knew of no doctor having attended the deceased before he was moved to his father's house. The deceased appeared to be very much swelled after he came back from Athens, where he went to see Doctor Cook. Witness did not know the cause of the swelling. Witness examined the wound only the one time, just after it was inflicted. He did not nurse the deceased after he was taken to his father's house. He did not think that the deceased was sat up with much after that. Deceased could walk about a little after being taken to his father's house, but was ever afterward helpless. He complained of his wound, saying that he was easy only when under the influence of medicines.

W. H. Griffith testified, for the State, that he had known the defendant Treadwell for the last ten or twelve years. He knew the deceased for some seven or eight years before his death. The witness could not remember the year in which the shooting of the deceased occurred, but it was some eight or nine years before this trial. The shooting occurred in a dispute which arose over an effort to get up a pony race. The deceased was drinking, and was very talkative. He proposed to bet on a certain horse, and the defendant asked him what he wanted to wager. He said that he would bet a quart of whisky. Some words and a little fight ensued. The defendant struck the deceased several times, and the deceased made some little defense. They were presently separated by the bystanders. When the defendant was released, he walked to a point behind a neighboring house, where he remained about a minute. The deceased was released about this time. He said that he was not angry, and wanted

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to talk to defendant. Defendant and deceased met each other presently in the presence of the witness. The deceased was waving his hands, and said: "Dave, by G—d, I did not mean to insult you." Defendant told deceased to keep his hands out of his face. Deceased paid no attention to this, and about this time witness heard the report of a pistol, and deceased fell, calling for some one to help him. Defendant remarked: "Now you will keep your G—d d—d hands out of my face." When the pistol fired, the defendant was standing to the left of the witness. In a few minutes the witness saw some one going off. Witness thought that the defendant owned one of the ponies, but was not a party to the bet.

Cross-examined, the witness said that the difficulty occurred in the town of Goshen, near the corner of Jones's store. Witness was within two steps of the parties. Deceased had a good deal to say about the race. When the defendant asked him what he proposed to bet, he replied, in a daring manner, gesticulating with his hands in defendant's face: "By G—d, sir, a quart of whisky." The defendant appeared somewhat insulted by the bet offered, and replied, "I don't make such bets." The deceased may have said that he was as big and as good a man as the defendant when he offered to bet the quart of whisky. The defendant either pushed the deceased with his open hand or struck him, knocking him back six or seven steps. The deceased went back to defendant, when the latter struck him three or four blows before they were separated. Witness saw the deceased with an open knife in his hand after the parties were separated. Either witness or another man took the knife away from deceased. The defendant was near the width of the court room distant from the deceased when the latter was released. In the effort to separate the parties, the witness first caught the defendant, who told witness to release him; that he had no intention of harming the deceased. He then, on being released, went from, and not toward, the deceased. On defendant's return from behind the house, they met, and in a minute or two the shooting occurred. Deceased had nothing in his hands at that time. He was swearing and making threats when the defendant went to the rear of Jones's store. The defendant was standing still when the pistol fired, and was telling the deceased to keep his hands out of his face. When shot, the deceased was apologizing in a drunken manner.

J. N. Pollard was the next witness for the State. He testified

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that the deceased was shot in November or December, 1875. Witness knew the defendant by sight. At the time of the difficulty which terminated in the shooting, Webb Berry and John Miller were making a horse race, on which the deceased proposed to bet a quart of whisky with the defendant. The defendant replied: "Do you think I would belittle myself betting a quart of whisky on a horse race?" The deceased, under the influence of drink, was making some gestures at the defendant, and the defendant knocked and kicked him up against a wagon wheel. The deceased ran his hand in his pocket, and defendant called to him: "Pull it out; I am good at that too." Defendant then went to the rear of the house, and returned in a few minutes. Deceased met him, apologized in a drunken manner, waving his hands, and defendant fired, drawing his pistol from his hip pocket. Two courts prior to this trial, the witness had a conversation with the defendant. The defendant, taking witness aside, asked him if he was a witness in this case. Witness replying that he was, defendant told him how the shooting occurred. Witness replied to him: "I did not see it that way." The deceased had nothing in his hands when he was shot, and was making no effort to fight.

Cross-examined, the witness stated that the first dispute arose near the southwest corner of the store, and the other, in which the shot was fired, near the northwest corner. The witness thought the defendant choked the deceased a little before he struck him. Defendant did not crowd the deceased. Deceased was cursing when defendant went behind the store, but was using no threatening language. Two men took the defendant behind the house. Defendant, on his return, walked up to where the deceased and Griffith and others were standing and said: "I will show you how to insult a gentleman." The pistol he used was a small weapon. He carried it in his hand to his horse. He fired at the deceased from about six feet range, his pistol hand a little extended. He fired as soon as he drew. He made no effort to shoot. No one caught defendant when he drew his pistol. The deceased did not pull a knife from his pocket during the fight. Witness did not see Griffith or any one else take a knife from deceased. The defendant took no stock in the horse race. Witness had never seen him, defendant, take a drink. Witness knew nothing of a dog fight occurring at the time or place of the shooting. When deceased fell, the defendant walked up to him, cursed, and said: "You will learn now how

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to insult a gentleman." He then mounted his horse and rode off at a rapid gait. The State closed.

Felix Adams was the first witness introduced by the defense. He testified that he now lived near the town of Goshen, and lived in the town at the time of the difficulty in which the deceased was shot by the defendant. Some of the boys were trying to arrange a horse race. The deceased proposed to bet the defendant a quart of whisky on the race. The defendant declined, saying: "Do you suppose I would belittle myself by betting a quart of whisky on a horse race? I will bet a bunch of ponies." The deceased then ran up close to defendant, waving his hands in defendant's face. The defendant pushed him off, and told him to stay off. The deceased ran at the defendant again, and defendant struck him four or five times. Thereupon the deceased drew his knife. Defendant's brother then caught and started off with the defendant. The deceased called to him: "Don't run off; stand your ground. Come back and fight it out, but don't be a coward." The deceased was then following the defendant. The shooting took place some thirty or forty feet from where the difficulty began. Some dogs fighting attracted the attention of the witness, and he did not see the shot fired, but heard it and saw the smoke.

Cross-examined, the witness stated that, in the first difficulty, the deceased threw up his hands, evidently to ward off the defendant's blows. He backed three or four steps while the defendant was striking him. The deceased had not yet reached the wagon, or near to it, when he drew his knife. When the deceased put his hand in his pocket, the defendant placed his hand on his hip pocket, and said: "Draw it out, if you want to." The deceased, in backing at the time the pistol fired, even if he had gone far enough, would not have struck the wagon. He would have passed it by following the direction from where the shot was fired. Witness saw the defendant when he went to his horse with his pistol in his hand, after he shot the deceased. He did not stop after he fired, and there was no cursing afterward. The defendant mounted his horse, and left in a rapid lope. Witness several times met the deceased after the shooting.

On re-direct examination, the witness stated that he had never known the defendant to run a horse race. The witness had seen the deceased "knocking around" after he was shot, he, witness, thought, on foot. He knew positively that the deceased recovered enough to go about. The deceased, at the time of the first

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Statement of the case.

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difficulty, was in such a position that he could not strike the defendant. Witness had never seen the deceased sick, but saw him several times during the year 1875. He always looked like an unhealthy man. The defendant went to his horse direct, after he fired. He did not stoop over the deceased and curse.

Webb Berry was the next witness for the defense. He testified that he had known the defendant and the deceased about three, four or five years, at the time the shooting occurred. It occurred between one and two o'clock in the evening, in the town of Goshen. The witness and John Miller were preparing to run a horse race. The deceased went up to the defendant and proposed to bet him that the bay mare would win the race. The defendant replied that he did not bet on horse races, and that if he did, he would not belittle himself by betting a bottle of whisky. The deceased insisted that the defendant should bet with him, saying: "I am as good a man as you are, and as big a man as you are, and I will bet you a quart of whisky." Deceased got up close to the defendant and a fight ensued. When they parted, defendant went around behind Jones's store. As he started the deceased called to him: "Don't be a coward, but come back and fight it out." When the defendant came back from behind the house, the deceased approached him, and defendant told him not to come toward him. The deceased kept on his course toward the defendant. Defendant waved his hand at him, told him again not to approach, backed against Jones's store, and the pistol was then discharged. Witness did not see the pistol until after it was fired. He, however, did see the defendant push the deceased back before the pistol fired. The defendant backed at least ten or twelve steps before he shot. When the defendant came back from the rear of Jones's store, and when he was met by the deceased, he was going toward his horse. Brown and Griffith took the knife away from the deceased. The deceased's knife was open during the first difficulty. It was taken from the deceased about the time the defendant went to the rear of the store. Witness did not know whether or not the defendant saw the knife taken from the deceased. The defendant had his pistol in his hand when he went to his horse. He rode off in a lope.

George McCrary was the next witness for the defense. He testified that he was in the front of the south part of Jones's store when the difficulty between the deceased and the defendant began. He did not see the blows given and received. When



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the witness first saw the difficulty, the defendant's brother had hold of him, and Griffith had hold of the deceased. The witness saw the deceased run his hand into his pocket and draw his knife, and heard the defendant say: "If that is your game, I am as good at it as you are." Defendant's brother then caught defendant, and the two went off behind the store. Deceased called out to the defendant not to be a coward, but to come back and fight it out. Griffith got the knife from the deceased about the time the defendant was taken behind the store. When the defendant came from behind the store, he started toward his horse, which was hitched some forty or fifty yards, nearly west, from Jones's house. The shooting took place about opposite the west door, or about fifteen feet from the northwest corner of the store. The deceased was drunk and staggering; the defendant sober. Witness saw the deceased once or twice after he was shot, once in the town of Goshen. This was in May, 1876. Witness did not know whether or not the defendant knew that deceased had been disarmed of the knife, nor did the witness himself know whether or not the knife was actually taken from the deceased, or whether the deceased was merely prevailed upon to put it back into his pocket. Defendant went to his horse immediately after the shooting. He said nothing to the deceased.

Cross-examined, the witness stated, in reference to seeing the deceased in Goshen after the shooting, that he did not know where he was going at the time. When the deceased ran his hand into his pocket, the defendant ran his left hand under the left lappel of his coat, and said to the deceased: "If that is your game, I am good at it too." Defendant rode off in a lope after the shooting.

John Miller was the next witness for the defense. He testified that, prior to the difficulty, he had seen the deceased but once, and the defendant but two or three times. The defendant, the witness and Doctor Johnson, returning from a camp hunt on Cedar creek, got into the town of Goshen some time during the evening of the day on which the difficulty occurred. On the way to town the defendant had proposed to the witness to trade pistols. Witness let the defendant have his pistol, and was to get the defendant's pistol from Frank Peppin, and the exchange was to be considered permanent if the defendant's pistol suited the witness. With this understanding, the defendant kept witness's pistol, and some time afterward witness got the defend-

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Statement of the case.

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ant's pistol. This trade occurred several miles distant from Goshen.

At Goshen, witness and Webb Berry made arrangements to run a horse race. The deceased, who was drinking somewhat, proposed to the defendant that they make a bet on the result of the race. The defendant declined, saying that he never bet on horse races, and never drank. A little fight between the defendant and the deceased was the result. After the fight, the defendant went behind Jones's store, and some parties took the deceased off down the road, east. When these parties turned the deceased loose, he came back, saying that the defendant was a coward. He called to defendant, and told him not to leave the ground, but to come back and fight. The witness did not see the pistol fire, as the weapon was hidden from his view by the corner of the house. He saw the deceased when he eased back and sat down. Immediately after the pistol fired, the defendant, without saying a word or uttering an oath, went to his horse. The pistol was a five shooter, loaded all round.

Cross-examined, the witness said that he, defendant, and Doctor Johnson spent but one night on the camp hunt. Defendant and witness got to talking about trading pistols on their way to Goshen, and several miles from town the witness himself put his pistol into the defendant's pocket. He did not remember which pocket. The witness saw the defendant but once after the difficulty, and that was on the evening of the same day, at the house of his, the witness's, father. Witness was a stranger in the county, on his first visit to his father's family in Goshen. Witness was surprised to see the defendant get into the difficulty, as he appeared to be a quiet, peaceable man. The deceased sank down within five or six feet of the store door. Two minutes only transpired between the two difficulties.

Thomas Treadwell, the brother of the defendant, was the next witness examined in his behalf. He testified that the difficulty which culminated in the shooting of the deceased arose in a dispute about a horse race. The deceased proposed to bet the defendant a quart of whisky on the result of the race. The defendant declined, saying that he would not bet on a horse race, and that, if he did, he would not bet so small a thing as a bottle of whisky. The deceased then retorted that he was as good a man and as much of a man as the defendant, and that he would bet a quart of whisky with him on the race. Deceased then ran up to defendant and shook his fist in his face. Defendant pushed

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him back. Deceased rushed back again, shaking his fist in defendant's face, when the defendant struck him and knocked him back. The deceased then drew his knife, struck at defendant with it and missed him. Some parties then caught the deceased, and the defendant went off around the house.

Deceased, being released about the time that the defendant started around the house, called to defendant to come back, stand his ground and fight it out like a man. In a short time the defendant came from behind the house, and started towards his horse. The deceased met him and made at him again. The defendant backed, and the deceased followed him, with his right hand on his hip pocket, and knocked defendant's hat off in an effort to strike him, and about this time the defendant fired. The defendant said nothing after he shot the deceased, but walked direct to his horse.

Webb Berry, being re-introduced by the defense, testified that at the time of the shooting he was well acquainted with the defendant's reputation as a peaceful and law abiding citizen. It was perfectly good.

Doctor A. A. Johnson testified, for the defense, that he was at the time of the shooting, and had been ever since, a practicing physician, residing in the town of Goshen. He was in his house in that town at the time of the difficulty between the defendant and the deceased, and heard the report of the pistol at the time the deceased was shot. He saw the deceased a few hours after he was wounded, and attended him in a professional capacity until he was moved away, covering a period of several weeks. Doctor Rooks was associated with the witness in attending the deceased. They examined the wound and found it a little to the right side and just below the navel. The ball penetrated to the cavity of the stomach, bore down to the right, and lodged near or about the right hip joint on the back side. Witness and Doctor Rooks probed the wound. The witness did not think that any of the internal organs were injured. The urinary organs and the intestines, the witness thought, escaped. The shooting occurred on or about November 24, 1875. The wound was not necessarily a fatal one. At most it would have produced lameness, and nothing more. During his attendance upon the deceased, the witness watched the deceased's urine, and at no time detected indications that the urinary organs were involved. During the summer before he was shot, the deceased had a severe attack of fever, attended with convulsions, or fits. This sickness lasted

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Statement of the case.

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about a week, during which time the witness waited on him. Had the ball, when he was shot, passed through the bowels of the deceased, his death within thirty-six or forty-eight hours would have been the inevitable result. If the bowels or other internal organs had been injured, the witness and Doctor Rooks would most certainly have discovered it within the three or four weeks that they attended the deceased. Such a wound as the one inflicted upon the deceased would not, in the opinion of the witness, produce dropsy. The defendant had a good reputation for peace in the community in which he lived.

Cross-examined, the witness stated that the defendant was a friend of his. He did not see the defendant after the difficulty. Dropsy is sometimes an organic disease. When the witness left the deceased, three or four weeks after the shooting, the wound was suppurating and doing well. In the opinion of the witness, the wound in no wise contributed to the death of the deceased. Witness did not see the deceased in his last illness. Witness did not positively know that the ball entered the cavity of the stomach. The witness was asked to explain, before the jury, the effect upon the system of blood poisoning from gunshot wounds. He replied that he had never heard of blood poison. He was then asked if the wound was not suppurating when he last saw it, and if matter flowing from that wound on the inside cavity, accumulating, and being absorbed by the system, would not produce blood poisoning, general debility and finally death. The witness replied that he knew nothing about such matters. He was then asked what would be the effect of the accumulation of matter on the inside of the abdomen, which had no escape by absorption. He replied that he did not know, and declined to answer kindred questions upon the ground that he was not posted. Witness very carefully watched the progress of the Garfield case, and it was his deliberate opinion that Garfield was professionally murdered. If the deceased ever had dropsy before he was shot, the witness did not know it. Men had recovered from wounds through the bowels.

On re-direct examination the witness stated that he made no particular examination to find out whether or not the deceased had dropsy. Witness gave medicine to keep the bowels of the deceased open. Witness saw the deceased in Goshen on crutches once—in May, 1876. This was the one time he saw the deceased after he was taken to his father's house.

The substance of the testimony of Doctor R. F. Cook, the next

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witness in the case, is set out in the opinion of the court at sufficient length.

Felix Adams and W. H. Griffith were separately introduced by the defense and testified that they were perfectly well acquainted with the reputation of the defendant for peace and quietude. His reputation in this respect had always been good.

Warsaw Robinson was next called by the State, in rebuttal. He testified that during the difficulty he saw the defendant go behind Jones's store and change his pistol from one pocket to the other.

The motion for new trial raised the question considered in the opinion.

*Richardson & Jones and Faulk & Faulk, for the appellant.*

*J. H. Burts, Assistant Attorney General, for the State.*

WHITE, PRESIDING JUDGE. On the twenty-fourth day of November, 1875, appellant Treadwell had an altercation and rencounter with one G. R. Honeycut, in which rencounter he shot said Honeycut with a pistol. On the eighth day of the following September, 1876, or nine months and a half after he was shot, Honeycut died. Appellant was indicted for the murder on the twenty-eighth day of October, 1881, nearly six years after the shooting, and over five years from the wounded man's death. At the trial appellant was found guilty of murder in the second degree, his punishment being assessed at five years' imprisonment in the penitentiary.

Though the deceased was laid up for some time, and never was entirely well after he was wounded by appellant, yet, in our opinion, the evidence, as presented in this record, not only fails to show that he died of the wound, but, if it shows anything at all with certainty as to his death, shows that death was caused by disease which was not, and perhaps could not, have been produced or occasioned by the wound. Deceased was shot in the abdomen, just below the navel. Doctor Johnson, who saw deceased just after he was shot, and who attended him several weeks after he was shot, says: "The wound was not necessarily a fatal one; at the worst it would only have produced lameness." Again he says: "I don't think the wound contributed to the death of the deceased." If left to itself, we might feel inclined to hesitate about taking Doctor Johnson's testimony, or, rather, his

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Opinion of the court.

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opinions, as an expert as far from being conclusive, since he swears he has never heard of "blood poisoning," and that though he "watched the Garfield case very carefully, it was his opinion that he (Garfield) was professionally murdered." There is, however, other expert testimony. Doctor Cook testifies that deceased was under his treatment for about a month; that he and Doctor Parsons examined him very carefully, and pronounced his disease "pericarditis," or dropsy of the heart; that it would require direct injury to the heart to bring about "pericarditis." "Blood poison is not likely to occur in eight or ten months after a wound was inflicted. I could not tell what caused the pericarditis in this case. I and Doctor Parsons gave deceased a thorough examination, and reached no conclusion as to its cause. Doctor Parsons is a physician of very high standing; I know of no better in the State." He says deceased was brought to him for treatment six months after he received the wound. "Deceased never complained of the wound, but complained all the time of pain in the region of the heart. \* \* \* Pericarditis is usually caused by a direct injury to the heart, and it is sometimes caused by an attack of rheumatism, and various other causes, many of which are unknown. Deceased was liable to die suddenly at any time. \* \* \* Deceased made no complaint of the wound. I have seen an old wound break again, but I examined the wound in this case a number of times while he was with me, and on the day before he left, and it seemed perfectly healed. The pus usually forms in a very short time after a wound, and if blood poisoning should set up, it would cause death before pericarditis could be produced, if blood poisoning could cause pericarditis at all. I don't think blood poisoning could cause pericarditis. \* \* \* If the wound arose and run after he left me, my opinion is that it and pericarditis both produced death together."

To say the least of it, this evidence leaves it extremely doubtful if the wound even contributed to the death, much less that it caused it. To sustain a charge for murder, the State must in all cases show that there was a homicide. "Homicide is the destruction of the life of one human being by the act, agency, procurement or culpable omission of another." (Penal Code, Art. 546.)

Has a homicide been proven in this case? We do not hesitate to say that it has not been proven with that degree of certainty that we would feel warranted in saying that on account of the

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Opinion of the court.

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proof a citizen should be branded as a murderer and punished as a felon.

The court erred in refusing a new trial, and the judgment is reversed and cause remanded.

*Reversed and remanded.*

Opinion delivered June 14, 1884.

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[No. 3213.]

## JOHN HEFNER v. THE STATE.

1. COMPLAINT—VARIANCE.—The date of the offense is alleged in the complaint as "one thousand eight hundred eight four." In the information it is set out as "March 30, 1884." *Held*, that the complaint alleges an impossible date, and that the motion to quash the information upon the ground of fatal variance should have prevailed.
2. PLEADING—PRACTICE—AUTREFOIS CONVICT, to be considered as a plea, must allege the proceedings which resulted in such former conviction, *i. e.*, matter of record, to wit, the former indictment and conviction; and matters of fact, to wit, the identity of the person convicted, and of the offense of which he was convicted. See *Williams v. The State*, 13 Texas Court of Appeals, 285, for the rule as stated, which is a correction of the rule as laid down in *Troy v. The State*, 10 Texas Court of Appeals, 319.

APPEAL from the County Court of Wilbarger. Tried below before the Hon. J. P. Orr, Special County Judge.

The conviction was for an aggravated assault and battery, and the penalty imposed was a fine of fifty dollars.

*Wheeler & McGhee*, for appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. In the complaint the date of the offense as written is "one thousand eight hundred *eight four*." In the information the date is set forth as the thirtieth March, A. D. 1884. A motion was made to quash upon the ground of fatal variance. Under the rule laid down in *Collins v. The State*, 5 Texas Court of Appeals, 37, the motion was well taken and should have been sustained.

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Defendant's plea of former conviction was an almost literal copy of such a plea in *Troy v. The State*, 10 Texas Court of Appeals, 319, which this court held to be good, but which does not appear to be good under subsequent decisions (*Williams v. The State*, 13 Texas Ct. App., 285,) and the court did not err in striking the same out for insufficiency.

Because the complaint states an impossible date, and because of fatal variance between the information and complaint, the judgment is reversed and the prosecution is dismissed.

*Reversed and dismissed.*

Opinion delivered June 25, 1884.

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[No. 2935.]

T. P. WOOD v. THE STATE.

1. DISTURBING RELIGIOUS WORSHIP—DEFINITION OF "WILFUL."—The gist of the offense of disturbing religious worship is that the disturbance was "wilful." The word "wilful," when used in a penal statute, means with evil intent, or legal malice, or without reasonable grounds of believing the act to be lawful.
2. SAME—FACT CASE.—See evidence held insufficient to support a conviction for disturbing religious worship, inasmuch as it does not show the disturbance to have been wilful.

APPEAL from the District Court of Burnet. Tried below before the Hon. W. A. Blackburn.

This was a conviction for the wilful disturbance of religious worship. A fine of twenty-five dollars was the penalty imposed.

W. O. Shugart, for the State, testified that he was present at what the people called preaching at a school house near Corwin, Burnet county, on the third Sunday in March, 1883. Reverend Mr. Hansboro conducted the exercises, and during the sermon propounded a question, which the defendant proposed to answer by asking a question. Mr. Hansboro told him not to interrupt him. The preacher went on to say something about a "mighty rushing wind." The defendant spoke up: "Yes, and there was a sound in that wind, too." The preacher then said to defend-



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ant: "If you want to talk, you go outside." The defendant interrupted the preacher two or three times with questions, in a voice which could be heard all over the house. The congregation was composed of thirty or forty well behaved people. The witness paid as much or more attention to the defendant than to the preacher.

J. D. Kennedy, for the State, substantially corroborated the first witness as to what transpired on the Sunday in question; and stated in addition that he was present on the evening before, when the same preacher conducted services. He stated at the outset that he invited prompt correction, during services, if he misapplied the Bible; that he wanted anyone to correct him if he stated anything wrong. Defendant asked the preacher a question that night. The preacher replied: "We will talk about that to-morrow. In the meantime you read the tenth chapter of Acts." Defendant asked the question in a very polite manner. When services closed next day, Sunday, after the occurrences related by Shugart, defendant rose in his place, with Bible in hand, and asked the congregation to remain a few minutes and hear him. Witness saw Mr. Barnhart speak at that time, but did not hear what he said. The little episode seemed to arouse some feeling in the congregation.

J. S. Barnhart testified, for the defense, that he reached preaching on the Sunday in question about ten minutes before the services concluded. Defendant did not interrupt the preacher while witness was there. When the congregation was dismissed the defendant, with his Bible in his hand, called on the congregation to give him attention while he read a few passages from Scriptures. Witness walked down the aisle, met the preacher and said to him: "Let's have no controversy." He went on to defendant and made the same request. Defendant replied: "This is none of your business; you are bad medicine anyhow; I want nothing to do with you. If you want anything out of me you can get it. Name your time and place, for this is no place for trouble." Mrs. Kennedy, the defendant's mother-in-law, then took defendant's arm and said: "Shut up your mouth, and let's go home." The preacher, Mr. Hansboro, was a Christian or Campbellite, and was conducting a series of meetings at the time and place. There was feeling existing between witness and the defendant at the time.

I. D. Standifer testified that, some time before the meeting in question, he and defendant (he being a Campbellite and defend-

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ant a Baptist) had a theological argument, in which defendant said: "If your church can convince me that faith comes before repentance, I have nothing more to say. Your church can then baptise me." Before the Sunday in question, witness told Mr. Hansboro about this conversation, and requested Mr. Hansboro to preach a special sermon on faith and repentance for the benefit of defendant, as the defendant was an intelligent, conscientious and influential citizen. It was the custom of the Campbellite church to invite questions, etc., during service, and they did not regard the practice as interruption. After the occurrences of Sunday, Mr. Hansboro told witness that he did not answer the question propounded, because defendant insulted him that morning by introducing him to McElroy in this wise: "Brother McElroy, let me introduce you to Brother Hansboro, my old Campbellite friend." Mr. Hansboro said: "I don't wear the name," and walked off. Witness was not present when the disturbance took place.

T. H. Hagar testified, for the defense, that he and defendant sat near together, and near the preacher, at the time of the alleged disturbance. The preacher stood almost in front of witness, and talked right in the defendant's face. The preacher was talking about the "Day of Pentecost, when there came a noise, as of a mighty rushing wind, and filled the house." He asked some questions, and defendant asked if he might answer them. The preacher replied, in a loud, harsh, gruff voice: "If you want to talk, go outside." The preacher went on to say that the Holy Ghost fell on no one but Peter; that it "just wholloped itself around Peter's tongue and made him say anything it wanted him to say." The preacher, during the service, spoke of the Bible as the Holy Ghost. The defendant called out: "Yes, like a crank is the lever of a mechanic's machine." Witness related the subsequent proceedings as the previous witnesses did. The defense witnesses concurred in the statement that the defendant spoke in a respectful manner.

The motion for new trial relied upon the insufficiency of the evidence to support the verdict.

*Cook & McSween*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

## Syllabus.

WHITE, PRESIDING JUDGE. Appellant was convicted under an indictment charging him with wilfully disturbing a congregation assembled for religious worship, "by propounding loud and audible questions to the preacher or elder, while conducting said religious services, and by using angry words and gestures," etc. As made by the evidence and the able brief of counsel for appellant, the case in some of its features is most interesting and presents for theological or ecclesiastical disputation questions more intricate and perplexing than are the matters of law involved in its determination on this appeal.

A disturbance of religious worship under the statute (Penal Code, Art. 180), to be punishable, must have been wilfully done. "Wilfully" is the statutory word which characterizes the offense. "When used in a penal statute, the word 'wilful' means more than it does in common parlance. It means with *evil intent* or legal malice, or without reasonable grounds for believing the act to be lawful." (*Thomas v. The State*, 14 Texas Ct. App., 200).

Taking this as the meaning of the word "wilful," we are of opinion that the evidence in this case does not sustain the conviction.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 25, 1884.

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[No. 3223.]

## SAM. ROCKHOLD v. THE STATE.

1. JURY LAW—PRACTICE.—A proposed juror is absolutely disqualified by answering that he has formed such an opinion of the defendant's guilt or innocence as would influence him in finding a verdict. It is only when he answers the qualifying question in the negative that he is required to be examined by the court as to how far his conclusions, however formed, will influence his action.
2. PRACTICE—EVIDENCE.—The difficulty which culminated in this homicide had its origin in trouble between a husband and wife, the wife, at the time of the homicide, being a guest of the deceased. Under the circumstances this court cannot hold improper the cross-examination of a wit-

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- ness for the defense that sought to disclose the relations existing between the defendant and the wife. See the opinion for the state of case.
3. **SAME—NEW TRIAL.**—A verdict cannot be impeached by the affidavit of a juror; hence it was not error to overrule a motion for new trial based upon the affidavit of a juror that the jury misconstrued the charge of the court.
4. **SELF-DEFENSE—MANSLAUGHTER.—CHARGE OF THE COURT** instructed the jury as follows: "But while the defendant had the legal right to protect himself from such actual or supposed attack without retreating, and to use all the force necessary for that purpose, even to the extent of slaying his adversary, and he may continue to use force until all danger, actual or apparent, has passed, he cannot use any more force than was necessary for that purpose; and should you believe beyond a reasonable doubt that the deceased did assault the defendant, but that he abandoned said assault, and it reasonably appeared to the defendant that he had ceased all violence toward him, and that afterward the defendant shot the deceased, he would be guilty of manslaughter." *Held*, error, inasmuch as the charge, in effect, instructed that the jury must believe, beyond a reasonable doubt, that the deceased did assault the defendant before they could find the grade of manslaughter. In other words, it reversed the rule which obtains in criminal cases, and applied the doctrine of reasonable doubt against, instead of in favor of, the defendant. See the opinion *in extenso* on the question.
5. **SAME—REASONABLE DOUBT** is a doctrine that should be applied to the case as sought to be established by the State, and not to a defense set up by the accused. In this case if the jury believed the defendant was assaulted by the deceased, or if they had a reasonable doubt about it, the accused was entitled to that defense to the extent that they either believed or doubted the fact.

APPEAL from the District Court of Wise. Tried below before the Hon. C. C. Potter.

Upon an indictment charging him with the murder of Joe Highlander, in Wise county, Texas, on the eleventh day of February, 1884, the appellant was convicted of murder in the second degree, and his punishment was assessed at a term of twenty-five years in the State penitentiary.

Sheriff Allen testified, for the State, that about nine o'clock on the night of February 11, 1884, the defendant came to him on the public square, in Decatur, and surrendered himself, saying that he had shot and, he thought, killed a man. He told witness to go with him and he would show him the man. Witness went with defendant to a point two or three hundred yards north of the northwest corner of the square, where the street from that corner crosses a ravine, and on the north side of the ravine, on the

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east edge of the traveled part of the road, he found the dead body of Joe Highlander. His head lay north, the body on the right side. The right arm, to the elbow, lay under the body, and an open knife, with the point of the blade extending toward the body, was held, the witness could not say how firmly, in the deceased's hand. Three fresh gunshot wounds were on the body of the deceased, two in the breast and one in the head, the latter a glancing shot, ranging from the front back. The other two shots, apparently smaller than that in the head, entered the body in front, one above the other, and ranged straight. The clothing for two or three inches around the upper wound in the breast was powder stained. The body of the deceased was taken to the witness's office, and the defendant was jailed.

When the defendant surrendered, he told the witness that the deceased was trying to cut him with a knife, and that he had to kill him. He showed witness where his coat and shirt were cut. His coat was cut through the left lappel, the cut running angling toward the right breast, and cutting his shirt for several inches. The skin was not cut, but was slightly marked. The other cut was lower down and straight across the shirt. At the same time the defendant gave the witness two pistols, one a large forty-four or forty-five calibre, and the other a smaller one. On searching the defendant, the witness found in his pocket a pocket knife, much larger than that found in the hand of the deceased. In the coat pocket of the deceased was found a pipe and some tobacco, and a black handled pocket knife much larger than that found in his hand. The two knives were here exhibited, and the witness judged that the smaller knife (the one found in deceased's hand) would be more effective in a personal conflict, because much sharper at the point and edge. Witness did not think powder would burn at a greater distance than a foot or two from the muzzle of the pistol. The defendant was deputy city marshal of Decatur at the time of the killing, and was a candidate for marshal. The smaller of the pistols surrendered by the defendant had but two loads in it; the larger had but one empty chamber. Deceased was a much smaller man than the defendant.

Mrs. Highlander, the widow of the deceased, testified, for the State, that the defendant came to her house about dark on the evening of the killing and halloed. Deceased went to the door, and defendant asked if Mrs. Wiseman was at the house, and asked to see her if she was. Mrs. Wiseman asked deceased to

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go with her and hear what was said. Deceased went, but shortly returned. In a short time Mrs. Wiseman was heard crying. Deceased told witness to tell Mrs. Wiseman to go in the house. Witness did so, and defendant asked permission to go into the house and talk. Permission was granted, and he went in. The discussion proceeded, and seemed to be something about Mrs. Wiseman's contemplated departure from town. Mrs. Wiseman said she cried before coming in because she was afraid defendant intended to kill her husband. The talk was resumed by Mrs. Wiseman in the presence of witness and deceased. During the time deceased and defendant took three drinks of whisky from a bottle produced by defendant. Finally defendant said, in effect, that if Mrs. Wiseman would leave, he would see that she was furnished necessary money; that her husband had imposed upon her long enough. The deceased, questioning defendant's right to interfere in conjugal quarrels, took offense, and requested defendant to leave the house. Defendant left his seat, slapped his hand on his pocket, and said: "Old man, are you mad? Do you want a pistol?" The deceased replied: "If I did, I could get one." The defendant then shook his fist under deceased's nose and said: "G—d d—n you, do you see that?" Deceased replied: "Yes, I see that." Witness asked defendant then to leave the house.

The defendant went out at the front door, but, instead of going off, went to the back door and called Mrs. Wiseman, who went to him. They talked some little time, Mrs. Wiseman standing in the shed room door and defendant outside. Witness went to them and again asked defendant to leave, and he did so. In the meantime the deceased left the house, going toward Lewis's. He returned shortly by the east gate, and called to the witness in a loud voice, asking her what was the name of the officer (defendant), and saying that he was going to town to procure his arrest. Witness tried, ineffectually, to dissuade him. He left, saying that he would be back soon. Soon after the witness got back into the house she heard three pistol shots in rapid succession, and she next saw her husband dead.

Mrs. Wiseman had been at the witness's house about a half hour when the defendant came there that night. She and her husband, Henry Wiseman, separated about that time. The deceased had a black handled knife, a part of the handle being broken off on one side. Being shown the knife taken from the pocket of the deceased, the witness identified it, and said that it was the only knife owned by the deceased when killed. De-

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Statement of the case.

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ceased had never owned the knife shown the witness as the one taken from his hand.

Miss Highlander testified substantially as did her mother, the last witness. She added that while playing with the knife recognized as the deceased's knife—the one found in his pocket—on that day, one of the children asked the deceased if he had another knife, and he said no.

Doctor M. L. York was the next witness for the State. The substance of his testimony was that, in his opinion, either of the breast wounds on the deceased was mortal. That on the head was not, being a glancing shot. He heard the three shots, and thought the first one the louder. The small knife in the deceased's hand was not gripped tightly. Whether a man being shot will retain a tight or a loose hold upon a knife held in his hand when shot, or drop it altogether, is a matter dependant entirely upon circumstances—upon the fact whether or not the shock produces contraction or relaxation of the muscles.

The substance of the testimony of J. J. Terrell was that the knife was held by the dead man very loosely—so loosely that if the hand had been turned over it would have fallen out. John B. Sanders testified, for the State, that some time during the previous fall, he lost a pocket knife on the square, similar in every respect to the one found in the hand of the deceased. The defendant was at that time deputy city marshal. The knife about which the wife of the defendant hereafter testifies was now exhibited to the witness, and he testified that it, too, was similar to the one he lost, except that the handle is broken. Mike Chambliss closed the evidence for the State by testifying that a few days before the killing he saw the defendant in possession of just such a knife as that found in the hands of the deceased. The defendant's knife was then exhibited to witness. That too, he testified, was similar to the one he saw in the defendant's possession.

R. M. Beville was the first witness for the defense. He testified that he heard the three shots, and thought the shot last fired was the loudest.

C. E. Lewis testified, in substance, that a few minutes before the shooting, the deceased came to his house and asked the loan of something to shoot with, saying that he wanted to protect himself from an officer who was misbehaving at his house. Witness advised him to report the affair to the sheriff, and he left,

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Statement of the case.

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saying he would do so. The three shots were fired a few minutes later.

Bob Clark was the next witness for the defense. He testified, in substance, that he, Henry Wiseman and Mr. Jones were partners in the carpenter business. On the evening of the killing, the defendant came to witness's shop and said that he was hunting some of the firm; that Mrs. Wiseman had been to him that evening with a pitiful tale of abuse by her husband, and wanted his assistance in getting out of town, and asked what he should do. Witness told him that money had been left with him, witness, to get her to her people in Honey Grove. He replied that he would see her that night; that she had obtained two dollars from him under false pretenses, and he would force her to leave by threatening her with arrest. Witness told him to tell Mrs. Wiseman that if she would leave on the next train, he would have the necessary money ready for her. Defendant left the shop, saying that he would do as requested.

Cross-examined the witness said that he interested himself because he needed Wiseman's work, and Wiseman was drunk, and would not sober up as long as Mrs. Wiseman was in town. Witness did not know the cause of the Wisemans' separation. He had heard each attribute the fault to the other. Wiseman had told witness that his wife accused him of intimacy with Mrs. Highlander. He, Wiseman, had never, in witness's presence or hearing, accused his wife of adultery with the defendant. Witness did not know that an improper intimacy existed between defendant and Mrs. Wiseman.

Henry Prince testified, for the defense, in substance, that, as he was about closing his house of business on the night of the killing, the defendant ran into his store, very much excited, saying that he wanted to see whether or not he was cut. He found his clothes cut in the manner described by the sheriff. He told the witness, in substance, that he had been to Highlander's house, and a disagreement of some kind came up; that he started to town, and Highlander followed him; that he told Highlander to go back, as he was drunk, and it would be his duty to arrest him if he went to town in that condition; that Highlander said: "G—d d—n you, I've got enough of this anyhow," and commenced stabbing at him, when he shot Highlander. Defendant asked what he had better do. Witness told him to surrender himself to the sheriff, and he and Ben. Allen, witness's clerk, went off together to hunt the sheriff.



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Opinion of the court.

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Ben. Allen, for the defense, corroborated the evidence of Prince, and testified in addition that the defendant said the first two shots were fired from his small pistol, and that, as Highlander would not desist, he shot him the last time with the large pistol. He either said that he fired his last shot as the deceased was falling or after he fell—the witness was not certain which.

The wife of the defendant testified that on the second night before the killing, the defendant gave their little boy the small horn handled knife exhibited by counsel to other witnesses. After the examining trial the defendant sent witness word to secure and preserve that knife, as he thought it very similar to the one claimed to have been found in Highlander's hand. Witness secured it, and gave it to the counsel for the defense on the day of this trial. Part of the handle was broken off, by the child throwing it against a box, before witness received word to secure it.

Jerome Johnson, whose mother kept the Mansion house, testified that the deceased cooked at his mother's house a month before his death. Witness had often seen the deceased with different knives, sometimes as many as three at a time. He was a great hand to trade knives. Witness had never seen him in possession of such a knife as that said to have been found in his hand after his death.

The material part of the testimony of Mrs. Ollie Wiseman, introduced by the State, was that when Highlander called to his wife and asked the defendant's name, the defendant had just left her at the back or shed door, and could not have progressed far. She appealed to defendant that day for assistance to get home, which was the first time she had ever spoken to him. She got two dollars from him, which she had never returned; he had never asked for it.

The questions involved in the opinion were raised in the motion for new trial.

*Crane, Sparkman & Trenchard*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. No error is seen in the action of of the court in standing aside several of the talesmen who, in answer to the interrogatory whether, from hearsay or otherwise, there was established in their minds such a conclusion of the

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Opinion of the court.

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guilt or innocence of the defendant as would influence them in finding a verdict, and to which each of the jurymen replied, "I have." The statute expressly declares that "if he (the juror) answer (this question) in the affirmative, he shall be discharged." (Code Crim. Proc., Art. 636, subdiv. 13.) It is only when he answers it in the negative that he is required to be further examined as to how his conclusion was formed, and the extent to which it will affect his action. (Id.)

We are not prepared to say that the cross-examination of the witness Cook with regard to the relations subsisting between Mrs. Wiseman and the defendant was either irrelevant or illegal, when considered in connection with the other evidence. Mrs. Wiseman was at the deceased's house; the defendant went there to see her; they had an interview outside of the house; she was crying, and said that she was afraid the defendant would kill her husband. The defendant said that he thought "her husband, Henry Wiseman, had imposed upon her long enough." The deceased took offense at this, and some sharp words ensued between the parties, and the deceased asked the defendant to leave his house. Inasmuch, then, as the difficulty originated on account of the trouble between Wiseman and his wife, the defendant's interest in, and connection with, the matter, it seems, might be proper in shedding light upon the motives which induced his conduct and actions on the night of the homicide.

In support of the motion for a new trial, the defendant produced the affidavit of one of the jurors as to what was the construction placed by the jury upon the charge of the court. Such affidavit was inadmissible for any purpose. A verdict cannot be impeached in that manner. "That the jury misunderstood the charge of the court, and were thereby misled in finding their verdict, is not recognized by the Code as cause for new trial. No case has yet occurred in this State wherein the courts have tolerated affidavits of jurors made to impeach their verdicts. If ever admissible, they can only be allowed in an extreme case, and under an imperative necessity for the accomplishment of justice." (*Johnson v. The State*, 27 Texas, 759.) In *Davis v. The State*, 43 Texas, 139, it was said: "There was no error in the refusal of the judge to permit, on the hearing of the defendant's motion for new trial, several of the jurors to be sworn to prove their misconstruction of the charge of the court. The permitting such a practice would result in greater evils than those that might possibly be removed by such action; and in

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Opinion of the court.

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this case, when the life of the defendant was dependent upon their verdict, if any portion of the jury entertained any doubts as to the meaning of any part of the charge, the Code authorized, and it was certainly their duty to return to the court and obtain from the judge, such additional charge or explanation as the question required."

As part of the thirteenth paragraph of the charge by the court, the jury were instructed, in connection with the law of self-defense, as follows, viz: "But while the defendant had the legal right to protect himself from such actual or supposed attack without retreating, and to use all the force necessary for that purpose, even to the extent of slaying his adversary, and he may continue to use force until all danger, actual or apparent, has passed, he cannot use any more force than was necessary for that purpose, *and should you believe beyond a reasonable doubt that the deceased did assault the defendant*, but that he had abandoned said assault, and it reasonably appeared to the defendant that he had ceased all violence toward him, and that afterwards the defendant shot the deceased, he would be guilty of manslaughter." We have italicized the objectionable portion of this instruction.

In our opinion the instruction was calculated to mislead, if in fact it did not mislead, the jury into the belief that they must first find or believe beyond a reasonable doubt that the deceased did assault the defendant, before they could find the defendant guilty of manslaughter. In other words, the charge reverses the rule which should govern the action of juries in criminal cases. It is not necessary that they should believe beyond a reasonable doubt any fact essential to the establishment of a defense or a lower grade of crime. On the contrary, if they have a reasonable doubt of the existence of the facts essential to establish guilt, or to establish the higher grade of offense, the defendant is entitled to the benefit of such doubt. The jury should never be required to apply the reasonable doubt to the existence or non-existence of a defense before they should give the defendant the benefit of such defense. The reasonable doubt should be applied to the facts or to the case as sought to be established by the State.

To make the case one of manslaughter, under the supposed state of facts upon which the court was charging, the jury might have entertained a belief that deceased assaulted defendant, and yet that belief not be beyond a reasonable doubt. If

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Statement of the case.

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they did believe it, or if they had a reasonable doubt about it, in either event the defendant should have had the benefit of it to the extent to which they either believed or doubted the fact.

Because of this error in the charge of the court, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 25, 1884.

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[No. 3190.]

## LEE REED v. THE STATE.

1. EMBEZZLEMENT—JURISDICTION.—A prosecution for embezzlement may be maintained in the county in which the accused took or received the property embezzled, or through or into which he may have undertaken to transport it.
2. SAME—STATUTE CONSTRUED.—The statute defining embezzlement (Penal Code, Article 876) includes only such bailments where the bailee had possession of the personal property for the benefit of the bailor, and not where its possession is held for the benefit of the bailee, such as for hire. See the opinion *in extenso* on the question.
3. SAME—JURISDICTION.—To sustain a conviction for embezzlement in a county other than that in which the property was received, it must be shown that when the accused received the property in the latter county he undertook to transport it into the county where the conviction was had.

APPEAL from the District Court of Milam. Tried below before the Hon. W. E. Collard.

The conviction was for the embezzlement of a horse, the property of one Gustave Gross. The penalty awarded the appellant was a term of five years in the penitentiary.

Gustave Gross was the first witness for the State. He pronounced his name with a guttural sound, between Gross and Gruss. On or about the first day of March, 1883, he was the proprietor of a livery stable in the town of Taylor, Williamson county, Texas. On that day the defendant, representing that he wanted to ride some miles into the country, came to the witness to hire a horse. The witness hired him a sorrel horse worth seventy-five dollars, at a stipulated price of one dollar and a half a day.

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Statement of the case.

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He was to be gone until the next morning, and offered to pay the hire in advance. Witness told him that he could pay on his return. The defendant said that he was going into the country to see his sister. The defendant did not return next morning with the horse, as he promised, and it was a week before the witness recovered the horse at a livery stable in Rockdale, Texas, twenty-eight miles distant from Taylor. Witness did not consent to the defendant riding his horse to Rockdale, nor to his selling or in any way disposing of his horse.

Theodore Hewitt was the next witness for the State. He testified that he and one John Stevens purchased a sorrel horse from the defendant in the town of Rockdale, on or about the first of March, 1883. The price at which the purchase of the animal was made was fifty dollars. Of this they paid the defendant twenty dollars, and were to pay him the remaining thirty when they became satisfied that defendant's title to the horse was good. The low price at which the horse was offered, he being well worth seventy-five dollars, excited the suspicion of the witness as to the validity of defendant's title. The defendant said that his name was Lee Reed; that he lived at Bryan; that he had come from Bell county, and could prove his title to the horse in Belton. Witness went with defendant to Milano, eight miles below Rockdale, to see if defendant could prove title to this horse at that place. Defendant at Milano promised to return for the thirty dollars balance on the horse in two or three days, but failed to appear. The owner, one Gross, came and claimed the horse on the next Thursday or Friday. On Saturday the defendant was brought to Rockdale under arrest. He then repaid the witness and Stevens the twenty dollars, and the horse was delivered to Gross. The defendant had relatives named Reed in Bell county.

The defendant came to Rockdale one evening about the middle of the week, but witness did not see him until next morning. The defendant was then with John Stevens. Witness did not know whether Stevens on the night before won any money from defendant. Stevens was a gambler. The witness was not. Witness did not know the defendant owed Stevens anything. The money was paid to defendant in cash. The horse was not pledged to, but was bought by the witness and Stevens from the defendant. Stevens is dead.

A. J. Worley was the next witness for the State. He testified that he first saw the defendant about twenty-five miles west or

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southwest of Cameron, on or about the first of March, 1883. This was on Tuesday morning, at the house of one Berry. Defendant wanted to sell the witness a sorrel horse, for which he asked fifty dollars. The fact that the horse was well worth more excited the suspicions of the witness as to the defendant's title. Defendant said that by telegraphing to Belton, he could identify himself as the owner of the horse. Witness and defendant went to Rockdale together, but witness did not buy the horse. The witness next saw the horse in the possession of Gross, the alleged owner, about four miles from Thorndale, a town in Milam county, on the International railroad.

A. J. Lewis was the next witness for the State. He testified that he knew the parties named Reed, who were related to the defendant. They lived in Bell county, four or five miles from the town of Rogers. Rogers is a town in Milam county, on the Gulf, Colorado and Santa Fe railroad, about twenty-five miles from Taylor, in Williamson county, and about the same distance from Rockdale, in Milam county. A man could ride to Reed's house from Taylor in an evening. Cameron was distant from Rogers eighteen miles.

Mrs. G. A. C. Reed, the mother of the defendant, testified, in his behalf, that the defendant was in the seventeenth year of his age. Witness lived in Bryan, Brazos county. On the first of March, 1883, the defendant was on a visit to his two uncles Reed, who reside near Rogers, in Bell county. He returned home on Thursday or Friday, and on the next day he started back, saying that he was going to Rockdale to redeem a horse he had pledged for twenty dollars. The witness gave him twenty dollars for this purpose. He left home, near Bryan, for the purpose of taking the train to Rockdale to redeem the horse.

Cross-examined, witness stated that defendant did not have a sister in Bell county; nor did he have a sister living in Williamson county. The defendant was arrested just as he was about to board the train to Rockdale, and was taken on to Rockdale. Defendant has relatives in Cameron.

The motion for new trial raised the questions discussed in the opinion, and attacked the sufficiency and competency of the evidence, and the correctness of the charge of the court.

*John N. Henderson*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

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Opinion of the court.

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WHITE, PRESIDING JUDGE. Two counts, one for theft and one for embezzlement, were contained in the indictment. After the evidence for the State was in, the district attorney elected the count upon embezzlement as the one upon which alone he claimed a conviction. This count for embezzlement alleged that defendant, as agent and bailee of one Gustave Gross, received into his custody the horse, and, as such agent, did fraudulently misapply and convert the said horse to his own use. In this second count these acts of defendant are alleged to have been done and committed in Milam county. The evidence shows that defendant hired the horse and came into possession of him in Williamson county. Did the district court of Milam county have jurisdiction of the offense? If defendant was guilty of embezzlement, then under the statute he could be prosecuted in any county in which "he may have taken or received the property, or through or into which he may have undertaken to transport it." (Code Crim. Proc., Art. 219; *Cole v. State*, decided at the present term.)

Two points are urgently insisted upon as fatal to the validity of a conviction in this case for embezzlement:

1. That our statute does not include as embezzlement a bailment which occurs from and is constituted by a hiring.

2. That if the hiring of a horse constituted a bailment such as is contemplated in the statute, then, to give the district court of Milam county jurisdiction of the offense, it must appear that at the time of the hiring in Williamson county it was understood that the horse was to be taken by the bailee into Milam county; that is, defendant must have undertaken to transport it into Milam county.

Article 876, Penal Code, in defining and punishing the crime of embezzlement, mentions amongst those subject to the provisions therein contained, any officer, agent, etc., consignee or bailee of money or property, etc.

Whether a fraudulent conversion by a bailee for hire was embezzlement came up for decision before the Supreme Court of Alabama upon a statute very similar to ours, and the court say: "Bailment is a term of very large signification, and is defined as a delivery of goods in trust upon a contract, expressed or implied, that the trust shall be executed and the goods returned by the bailee as soon as the purpose of the bailment shall be answered. (2 Kent, 559.) The accuracy of this definition is questioned by Judge Story, who defines a bailment as a delivery of a thing in trust for some special object or purpose, and upon

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a contract, express or implied, to conform to the object or purpose of the trust. (Story on Bail., sec. 2.) There are different kinds of bailments, involving different rights and duties on the part of the bailor or bailee. **When the general term *bailment*, *bailor* or *bailee* is employed**, whether in a private writing, in a verbal contract, or in a statute, its real meaning can be ascertained only by reference to the subject matter and the circumstances attending its employment.

“The connection in which the term *bailee* is found in the statute under consideration indicates very clearly that it is not used in its largest sense—that it was not intended to comprehend every species of bailment, and all who might stand to the owner of money, property or effects in the relation of a *bailee*. It is limited and confined to bailees of a particular class, those having possession wholly and exclusively for the benefit of the bailor—bailments where the owner parts with the actual possession, not with the right of property general or special, and is not without right to resume possession. The hirer of chattels for a term is a bailee, doubtless, but of a particular class or kind. The trust created is not exclusively for the benefit of the bailor, but rather for his own benefit. \* \* \* It is not a bailment of this character the statute refers to, but to bailments in which the bailor and bailee stand in a fiduciary relation, in which the bailee acts for and on account of the bailor, and not for himself.” (*Watson v. The State*, 70 Ala., 13.) In *Watson's* case, the facts of which are in every respect similar to the case before us, the court further held that the word “bailee” in the statute was a bailee standing in the relation of agent. And, this, we think, is a proper construction of the word used in our statute. The property embezzled must have come into possession or care of the party charged, by virtue of such office, agency or employment. (See 43 Texas, 455; 4 Texas Ct. of App., 406; 21 Texas, 775; 5 Denio, N. Y., 79.)

It would only be by virtue of such construction that jurisdictional venue of the offense could be entertained in any county other than the one in which the property was received, because his liability in such other county would only arise from an undertaking on his part to transport the property into it, and such undertaking would not likely arise under a relationship other than that of principal and agent.

On the facts as exhibited in this record, we do not think the statutory offense of embezzlement can be predicated, a bailee



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for hire of personal property not being such a bailee as the statute contemplates.

But, even if embezzlement could have been predicated upon the relation existing between the parties, still the jurisdiction of the district court of Milam county could not attach in the case, unless it had been shown that defendant undertook to transport the horse into Milam county when he received it in Williamson county. This was not done. If any offense is shown by the record, it is theft of the horse, and, had the conviction been on the first count in the indictment, which was dismissed, we see no reason why such conviction could not have been sustained upon ample authority. (Bish. on Stat. Crimes, sec. 419; *Maddox v. The State*, 41 Texas, 205; *Quitow v. The State*, 1 Texas Ct. App., 65; *State v. Coombs*, 55 Me., 477; 70 Ala., 13.)

Because the conviction for embezzlement is not warranted either by the law or the evidence, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 25, 1884.

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[No. 3236.]

16	591
39	208

V. R. SPRINGER ET ALS. v. THE STATE.

1. **DISORDERLY HOUSE.**—INDICTMENTS in two cases charged that defendant “did wilfully and unlawfully keep a disorderly house, to wit: A house kept as a common resort for prostitutes.” The Penal Code of this State, Article 339, defines a disorderly house as “one kept for the purpose of public prostitution, or as a common resort for prostitutes *and vagabonds*.” Exception was that the indictments were bad because they failed to allege that the house was kept as a common resort for both “prostitutes and vagabonds.” *Held*, that to be sufficient, the indictments should have so charged; wherefore, the trial court erred in overruling the exception.
2. **SAME—“PROSTITUTE,” “COMMON PROSTITUTE” AND “VAGABOND” DEFINED.**—The term “prostitute” and “vagabond” are not synonymous. As the words are used in the statute, it is not every prostitute that is a vagabond, and *vice versa*; and while the Code declares that every common prostitute is a vagrant, which means the same as vagabond, it does not mean that every prostitute is a vagrant. The word “vagabond,” as used in the statute, applies only to the common prostitute, the female

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Opinion of the court.

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who publicly sells her person indiscriminately to illicit intercourse with males, and not the female who surrenders her person to private prostitution. See the opinion *in extenso* on the question.

APPEAL from the County Court of Uvalde. Tried below before the Hon. T. S. Spencer, County Judge.

The indictments in these cases charged the appellants, V. R. Springer, Lee Guthrie and Frank Waller with the offense of keeping a disorderly house, as a common resort for prostitutes, in Uvalde county, Texas; the one alleging that the said house was so kept on the fifteenth day of January, 1884, and the other that it was so kept on the seventeenth day of January, 1884. They were convicted in both cases, the penalty in the first case being fixed at a fine of two hundred and fifty dollars, and in the second case at a fine of one hundred dollars.

The motions for new trials raised the question upon which the opinion of this court is predicated.

No briefs for the appellants have reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

WILLSON, JUDGE. In these cases the indictments charge that the defendant "did wilfully and unlawfully keep a disorderly house, to wit, a house kept as a common resort for prostitutes." Our Code defines a disorderly house as "one kept for the purpose of public prostitution, or as a common resort for prostitutes and vagabonds." (Penal Code, Art. 339.) This definition is different from that contained in the Code before the revision. In the original Code a disorderly house was "one kept for the purpose of public prostitution, or as a common resort for prostitutes, vagabonds, free negroes, or slaves." (Pas. Dig., Art., 2027.) Under that definition of the offense, these indictments would unquestionably be good.

It is contended, however, that, under the statute as it now is, the indictments are bad, because they fail to allege that the house was kept as a common resort for both prostitutes and vagabonds. In our opinion, this exception is well taken. Neither in common parlance nor in the definitions given by lexicographers are the words "prostitute" and "vagabond" synonymous. It is not every prostitute that is a vagabond, and vice versa. Our Code declares that a common prostitute is a vagrant,

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which means the same as a vagabond (Penal Code, Art. 355), but it does not declare every prostitute a vagrant. It is only the *common* prostitute that is by the law made a vagrant or vagabond.

Are all prostitutes *common* prostitutes? In the common acceptation of the terms, they are not. In the sense in which these terms are used in the Code, we understand a prostitute to mean a woman who is unchaste; who has surrendered herself to illicit sexual intercourse with men. A *common* prostitute is a public prostitute, who makes a business of selling the use of her person to the male sex for the purpose of illicit intercourse. A woman may be a prostitute, and yet have illicit connection with one man only; but, to be a *common* prostitute, her lewdness must be more general and indiscriminate.

We conclude, therefore, that the word "prostitutes," as used in the definition of a disorderly house, does not necessarily mean and include vagabonds, and that, therefore, a house kept as a common resort for prostitutes, unless they be *common* prostitutes, is not a disorderly house. It must also be kept as a common resort for vagabonds. If the house was kept for the purpose of public prostitution, then it is a disorderly house, without regard to what class of persons resort to it. But when the house is kept as a common resort, to constitute it a disorderly house, it must be kept for the common resort of *two* certain classes of persons, to wit, *prostitutes and vagabonds*.

This being our view of the statute, we think these indictments fail to charge any offense against the law, and the judgments are reversed and the prosecutions dismissed.

*Reversed and dismissed.*

Opinion delivered June 27, 1884.

16	593
28	140
28	202

[No. 2911.]

WALTER MORGAN v. THE STATE.

**PRACTICE HEARSAY TESTIMONY.**—A medical witness, having expressed his opinion as to the cause of the death of the deceased, was permitted, over the objection of the defendant, to testify that other physicians in attendance at the *post mortem* examination concurred with his opinion.

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*Held*, that the evidence was clearly hearsay and inadmissible; but, in view of the fact that the other physicians were subsequently introduced as witnesses and testified in person to the same effect, the error was immaterial.

2. **MURDER—IMPLIED MALICE—REASONABLE DOUBT.—CHARGE OF THE COURT** instructed the jury as follows: "Implied malice is an inference or conclusion of law upon certain facts found by the jury. Thus the law implies malice from the unlawful killing of a human being, unless the circumstances make it evident that the killing was either justifiable, or, if not justifiable, was so mitigated as to reduce the offense below murder in the second degree." *Held*, error; not because it shifts the burden of proof, but because it infringes upon the doctrine of reasonable doubt, and authorizes the jury to apply the doctrine in behalf of the State, to the extent that the evidence should show, beyond a reasonable doubt, the existence of such facts as would justify or mitigate the homicide, instead of authorizing the jury, as it should, to apply it in behalf of the defendant, to the extent that the evidence should, beyond a reasonable doubt, establish the existence of malice. See the opinion *in extenso* on the question.
3. **SAME—CASE OVERRULED.**—In so far as the rule announced in the case of *Sharp v. The State*, 6 Texas Court of Appeals, 650, is in conflict with the doctrine above announced, that case is overruled.
4. **SAME.**—It is urged by the State that inasmuch as the court charged the jury to acquit if they had a reasonable doubt of the defendant's guilt of murder in the second degree, the error in the charge quoted was immaterial. *Held*, that the two charges are in direct conflict, and as the defendant promptly excepted, his exception must be sustained.
5. **SAME—HOMICIDE AS RESULTING FROM AN ORIGINAL INJURY OR SUBSEQUENT NEGLECT AND MANIFESTLY IMPROPER TREATMENT.**—See the opinion of Judge Hurt for subdivisions twelve and thirteen of the charge of the trial court upon the subject of homicide, respecting the question whether or not the death of the deceased was the result of the original injury inflicted by the defendant, or whether it was the result of subsequent neglect and manifestly improper treatment of other persons, which charges are *held*, by a majority of the court, to embody the common law rule upon the subject, and to be inapplicable in this State, because the same has been changed, modified and ameliorated by statute. See, on the subject, the several opinions of Judges Hurt and Willson, and Presiding Judge White.
6. **SAME—DEFINITION OF HOMICIDE.**—The term "homicide" is more specifically defined by the statutes of this State than by the common law. Our Code defines homicide to be the destruction of the life of one human being, by the act, agency, procurement or omission of another. Such destruction of life must be *complete*, and complete by the act, agency, procurement or omission of the defendant.
7. **SAME—STATUTE CONSTRUED—CAUSA MORTIS.**—Article 547 of the Penal Code reads as follows: "The destruction of life must be complete by such act, agency, procurement or omission; but although the injury which caused death might not, under other circumstances, have proved fatal,

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Syllabus.

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yet, if such injury be the cause of death, without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is homicide." Construing the words "but although the injury which caused death might not, under other circumstances, have proved fatal," the majority of the court hold that they refer to all injuries which, under the circumstances of the particular case, may not be necessarily fatal, but may cause death, and not to such injuries as must, inevitably, cause death. Otherwise stated: If the injury be such that death is not a certain result—if it be such that human aid and skill may prevent its fatal termination—then it is such an injury as comes within the meaning of the words quoted. But if the injury be such that no human aid or skill could prevent its fatal termination, then the injury is not such as comes within the meaning of the words. For an exposition of the principle, see the opinion of Judge Willson.

8. **SAME.**—Article 547 of the Penal Code, in effect, provides that an injury which, though not necessarily fatal in itself nevertheless terminates in death, when death might have been averted by timely aid and treatment, is homicide by the act of the person inflicting it, unless it appears that there had been gross neglect or manifestly improper treatment of the person injured by some other person than he who inflicted the original injury. Herein consists the important change made by the statute in the common law rule. At common law, the neglect or improper treatment must produce the death in order to exonerate the person who inflicted the original injury. Under the statute it is not necessary that the neglect or improper treatment shall contribute in any degree to the death, but if there be gross neglect or manifestly improper treatment, either in preventing or in aiding the fatal effects of the injury, the death of the injured person is not homicide by the party who inflicted the original injury.
9. **SAME.**—"GROSS NEGLIGENCE AND IMPROPER TREATMENT," as construed by the majority of the court, are held to mean, not only such as produce the destruction of human life, but as well such as allow, suffer or permit the destruction of life. This construction is fortified by Article 548 of the Penal Code, which concludes as follows: "If the person inflicting the injury which makes it necessary to call aid in preserving the life of the injured person shall wilfully fail or neglect to call such aid, he shall be deemed equally guilty as if the injury were one which would immediately lead to death." See the opinion of Willson, judge, for an elaboration of the principle.
10. **ASSAULT WITH INTENT TO MURDER.**—The construction placed upon the statutes referred to would not operate to shield a defendant from all punishment for his criminal act, but an indictment for murder, as in this case, if supported by proper and sufficient evidence, would support a conviction for assault with intent to murder. See the statement of the case for evidence held to demand a charge upon the law of assault with intent to murder.
11. **SAME.**—JUSTIFIABLE HOMICIDE—CHARGE OF THE COURT upon the question of justifiable homicide required the defendant to resort to all other means, except flight, of preventing the threatened injury to himself, before taking life, regardless of the imminence of his peril. Held, error under the facts in proof.

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Statement of the case.

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APPEAL from the District Court of Travis. Tried below before the Hon. A. S. Walker.

The indictment in this case charged that in the county of Travis, State of Texas, on the nineteenth day of January, 1883, the appellant killed and murdered one Joseph Henderson, by stabbing him with a knife in the face and temple. The trial resulted in the appellant's conviction of murder in the second degree, and a term of five years in the penitentiary was the punishment assessed.

W. B. Hawkins was the first witness for the State. He testified that he saw the defendant at Cloud's stable, in the city of Austin, on the night that Henderson, the deceased, was hurt. About half past seven o'clock on that night the defendant rode into the stable, and witness told him to get down. He replied that he did not want to get down. He then rode through the stable towards the wagon yard, and engaged in a wordy interview with the yard master, a man named Wilgus. The witness heard the man Wilgus call for the police, and stepped out of the stable office. He then saw Wilgus running towards the stable, and the defendant after him on the horse. Witness met the defendant near the west door of the stable, and told Wilgus to go back into the yard, which he did. He then told the defendant to go out, and took the horse by the bridle, and told Buck Watkins to tap the horse behind, which Watkins did. Just as witness got near the door, leading the horse out, Henderson came in and he and the defendant spoke to each other, calling each other, the witness thinks, "pard." Witness supposed they knew each other. The defendant said that he wanted to see Sam. Cloud, and witness went to call Cloud, telling Henderson to hold the horse and back him off the cistern. The horse was cutting up. Witness went up stairs to call Sam. Cloud, and just as he and Cloud got to the door of the office, returning, the witness saw Henderson fall, and the horse go out at the door.

When the witness told Henderson to take the horse and back him off, the animal was standing on a cistern that had a heavy iron top. The witness had seen a mule lift this top off. The horse was captious and the witness was afraid he would uncover the cistern. Witness heard Henderson tell the defendant to get down from his horse and go into the office to the fire. He, Henderson, asked witness not to turn the defendant out, but to permit him to stay in the office. Some remark, not addressed to

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the witness, was made about a girl. Witness saw Henderson just as he struck the ground, falling backwards. Witness saw nothing strike him. Witness thought the action was brought about by fun, and told Henderson to get up. Witness then saw blood running from his face, and called to an old negro to help sit Henderson up. The defendant was just out of the door when the witness stepped into the stable on his return. Witness went direct to the telephone to call for the police, when the sash (window?) was kicked in. At this time there was a crowd around Henderson. When the sash fell in, the witness thought some one was shooting at him. Witness saw a wound on Henderson's left temple. It was a gash, and rose and fell like a pulse. He did not notice or answer the witness when the latter spoke to him. The deceased was taken up stairs to Mr. Cloud's room on Saturday, and to the hospital on Monday. The defendant made some remark as he rode off, which the witness did not understand.

This witness was subjected to a very rigid cross-examination, detailing at length the incidents of the tragedy, but producing no very material variation from the narrative in chief. He could remember the presence of no one besides the parties named. Daugherty, Langford and Albin were about the premises somewhere, but if they were in the neighborhood of the difficulty the witness did not know it. The witness was somewhat provoked when he undertook to lead the defendant's horse from the stable. He did not remember that Morgan complained that it was too cold to go out, nor did the witness remember that he so testified on the examining trial of this case. It was the impression of the witness that when Henderson first came up he put one hand on Morgan's leg, and the other on the horse's mane. Witness remarked to Henderson: "Joe, hold his horse until I see Captain Cloud; take him off the cistern." Henderson took hold of the horse about the time that witness let go, which was when the defendant said that he wanted to see Cloud. At that time the horse had one foot on the cistern, and the witness thought him, the horse, in danger. The cistern was six or eight feet north of the stable door. The horse was facing north, and was fretful and excited. The witness started with the horse straight through the stable north door, which is a double door, one side of which was closed. Witness had led the horse nearly to the front door when the defendant said that he wanted to see Cloud. It was now that Henderson appeared. The defendant was cursing :

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great deal, mostly at Buck Cloud. When the witness let the horse go, he got back to the cistern, and it was then he got his foot on the cistern. The cistern top was much like an oven lid, was heavy and hard to raise, but the witness once, and only once, saw it raised by an animal—a mule—and that time it was turned completely upside down. The witness had often pulled the cover off with his hand, but it was very heavy. It would bear the weight of a wagon, hack or buggy. Wagons had been driven over it. Witness remained no perceptible length of time up stairs. He told Cloud to come down, and immediately returned, and as he stepped into the stable he saw Henderson falling. He was the first man to reach Henderson after he fell, calling old Tony, a negro, to help. The two raised Henderson up.

When Henderson fell, the defendant went out at the front door of the stable. Witness picked Henderson up, sat him up, and went to the front door just in time to catch sight of the rump of a horse which he took to be the defendant's horse. Then witness went to the telephone in the office, thence to the safe, and it was then the breaking of the glass made him think some one was shooting. Some of the fragments of the glass struck the witness, and he thought he was shot. Six panes of glass were broken. When the blind was kicked to, breaking the glass, the witness was at the safe, trying, ineffectually, to insert the safe key. Witness got behind the desk when the glass was shattered, knowing that he could not be shot at that point, through the window. Witness did not retain that position longer than a minute. The defendant was arrested there, on the premises. Doctor Stalnaker arrived about a half hour after Henderson was cut. He washed the blood from Henderson's face, bathed his head, and inserted his finger into the wound and extracted some blood, and then bandaged the wound. He made no examination for skull fracture that witness was aware of. Doctor Stalnaker was with the wounded man when the witness left to go to his home, just north of the Capitol grounds. Witness returned to the stable about nine or ten o'clock that night. Witness could not remember whether it was Tuesday or Wednesday night after the cutting that Henderson was taken to the hospital. Witness attended to his business at the stable on Sunday, Monday and Tuesday, and went home at night. If counsel understood witness to say, on his examination in chief, that he was with Henderson constantly from the time he was cut until he died, they



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were mistaken. Witness supposed that he went up stairs to see Henderson on an average of fifteen or twenty times a day while deceased was at the stable, wounded, and visited him twice after he was taken to the hospital. Witness was not present when the physicians operated on the back of the deceased's head. While he lay wounded, in the stable, Henderson was attended by first one stable hand and then another, and most of the time by a lady, who staid up stairs.

If, after Henderson came into the stable, the defendant ordered him to stand up against the wall with another man, it was after the witness started up stairs. The defendant said something at the door about "getting" somebody, which the witness did not understand. Witness did not hear him say: "If anybody wants me, come here and get me." If Henderson was drinking that night witness did not notice it. At all events, he was all right at the time he came in. It was the recollection of the witness that the stock had just been attended to, and that he had not missed Henderson from the stable. From the way Henderson talked, witness thought that perhaps he might have had a dram. Henderson came into the stable at the east door. The Scandinavian saloon stood just across the street, but witness could not tell whether or not Henderson came from there, as he first saw him as he came in the stable door.

The witness was asked if it was not a fact that, without anything being said, Henderson walked up to the defendant's horse, caught him by the bridle with one hand, laid the other on his mane or on the defendant's knee, and was asked by defendant: "Do you live at Cloud's stable?" and answered: "I work here," and was then told by defendant, "You stand over there by that other man," meaning Buck Watkins? The witness answered that he witnessed no such scene and heard no such conversation. It was the impression of the witness that Henderson spoke first, saying "halloa pard," and that the defendant replied, "I believe I am your pard." If Henderson took hold of the defendant's horse before the witness let go, the witness did not know it. It was the witness and not Buck Watkins who led the defendant's horse towards the stable door, and it was Buck Watkins and not the witness who tapped the horse behind. Witness did not order Buck Watkins to beat the horse out of the stable, nor did he order Watkins to interfere with the horse in any way until the defendant raised the difficulty with the yard man. Witness did not see Watkins until the defendant and the yard man came up

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from the yard. Witness did not remember that Watkins was then leading the defendant's horse, and that defendant asked Watkins if he belonged to the stable, and on Watkins answering in the affirmative, that he said "Then I will go anywhere with you." Witness and Henderson both asked the defendant to get down. If Watkins also made such a request, witness did not hear him. When the defendant first came into the stable the witness thought he wanted his horse put up. Witness then saw that he had been drinking, asked him to get down, intending to take care of him the best he could, or to get rid of him if he was too drunk. Witness went back into the office as defendant rode into the yard, and came back into the stable when he heard Wilgus calling for the police. He then saw the defendant, who had stopped, walked up to him and told him he must keep quiet or leave the stable. Defendant replied that he "would do as he d—d pleased." Witness then, under the apprehension of trouble, told Watkins they must get him out of the stable, and to tap the horse while he, witness, led him out.

In answer to a question, the witness stated that he had testified once before about this case. If he then testified that he told Buck Watkins to lead the defendant's horse out of the stable, and that he, witness, slapped the horse on the rump, he did not remember it. His recollection was that he testified with regard to the matter just as he now testifies. At all events, he testifies now without reference or regard to his former testimony. It is the misfortune of the witness to have a poor memory.

On re-direct examination, the witness stated that when the defendant first rode into the stable, he asked him to dismount, and defendant replied: "It is none of your d—d business." Witness then returned to the office, and came out again when he heard Wilgus calling for the police. Defendant was then cursing Wilgus for something about a girl. It was then that the witness caught the bridle and told Watkins to tap the horse. Witness and Cloud witnessed the arrest of the defendant by officers Thorp and Johnson. Cloud pulled the defendant off his horse.

Buck Watkins was the next witness for the State. He testified that he lived in Falls county, Texas. He was at Cloud's stable at the time Henderson was out, having arrived there two evenings before from Arkansas. The defendant rode into the stable about half past seven o'clock on the night of January 19, 1883,

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and asked for Buck Cloud, Witness told him that Buck Cloud was in Arkansas. He then asked for some one else, the witness did not remember who. Witness asked him to dismount. The defendant then engaged in a conversation with the yard man, called "Dutch John," and the witness walked off, and defendant went into the back yard. Dutch John came back shortly and called for the police. Witness then returned and took hold of the rein of defendant's horse, stopped him, and told the defendant that his conduct would not do, and that he had better let the witness put his horse up. Defendant replied that he would do anything the witness advised him. Witness again advised him to get down and have his horse put up. Defendant replied that he did not want to do that; that he wanted to go home. Witness then told him that he had better go before he got into trouble. Witness then started to lead the horse out of the stable, and Mr. Hawkins, who was behind, strapped the horse, to drive him out. When the party got near the door, the defendant asked to see Captain Cloud. Hawkins then stepped to the door leading up stairs, leaving the witness standing talking to the defendant. About that time, Henderson stepped in and said: "Buck, I will attend to him." Witness supposed that Henderson and the defendant were acquaintances, and relinquished the horse. They got the horse on the cistern, when Hawkins told Henderson to back the horse off the cistern, while he went up stairs for Captain Cloud. Henderson backed the horse from the cistern against a stall. About this time, the defendant drew his pocket knife, and opened it with his left hand. Witness called out: "Look out, Joe, that young gentleman will cut you." Henderson was then pressing the horse back against the stall. The defendant having on a spur, spurred his horse forward, and struck three times at Henderson with his knife, striking the horse's neck the first and second blows, and Henderson in the left temple at the third blow. He then rode out of the stable, saying, as the witness understood him: "I have got one of the G—d d—d rascals, and if the rest follow, I will get them." He then rode to the front of the hotel and stopped, and Cloud came down just then, went to him and jerked him off his horse. By that time, the police came up, and the defendant was arrested.

Henderson's tone and language to the defendant throughout was kind and considerate. He asked the defendant in a kind manner to dismount and let him put his horse up, and promised

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to attend to the animal properly. The witness heard nothing that happened in the back yard, except Dutch John calling for police, and saw nothing but the defendant riding after John. The defendant's horse was a somewhat fiery animal, but did not seem extraordinarily excited. The witness did not notice that the defendant wore a spur until he commenced spurring his animal when he was being backed. He saw the defendant cut Henderson in the temple. The knife he used was an ordinary pocket knife, very similar to that of the witness, which the witness here exhibited. Witness first saw the knife when he called out to Henderson to look out. The defendant was cursing at the time. Witness did not see the knife after it was taken from the defendant's person. The defendant struck Henderson quite a heavy blow, and Henderson fell very much like one stone dead. Three hours afterward, when the witness next saw Henderson, he looked very much like a dead man. His face was bloody and he was unconscious. The wound in the temple was about as long as the width of the knife. Witness saw Henderson several times afterwards, and attended him off and on for a couple of days. He remained in the same comatose state during all the time that witness saw him. Witness did not see him after he was taken to the hospital. Witness identified the defendant as the man who cut Henderson. He had never seen Henderson since he was taken from the stable, but knows that Henderson is supposed to be dead.

As was the case with the previous and all subsequent witnesses, the cross-examination of this witness was very searching. He stated that at the time of this homicide he was employed by Cloud at the stable, and intended to proceed on his way to Falls county the next day, the twentieth of the month, but was detained as a witness under bond, and consequently took service in the stable. His connection with the parties to this difficulty was the result of pure accident. He had been assisting a young man named Boukman to feed some horses, and as Boukman was busy when the defendant came into the stable, he volunteered to take defendant's horse. The defendant had no weapon in his hand when he followed Dutch John into the stable from the yard. He, defendant, had stopped before witness caught hold of his horse. Hawkins at no time told the witness to lead the horse out, nor did Hawkins lead the horse himself. The witness himself led the horse, and Hawkins slapped him behind. According to the witness's recollection, when the defendant came into the stable,

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from the yard and stopped, he asked the witness if he, witness, belonged to the stable, and said that he would go anywhere with witness. To this the witness replied: "Partner, you had better get out before you get into trouble." At that time Hawkins was standing either in the office door, or in the hallway leading up stairs. Witness led the horse to a point near the stable door, and the defendant said that he wanted to see Captain Cloud. Hawkins had not then gone after Captain Cloud, and the witness told him, Hawkins, to go. Witness at that time had the rein himself. Henderson at this moment walked in and said that he would take the horse, and witness released him. The horse was standing still when the witness released him, and when Henderson took him he was standing with his hind feet on the cistern.

When Henderson came in the witness thought he was drinking, and two hours afterwards could plainly smell liquor on his breath. Henderson backed the defendant's horse very roughly, calling "Whoa! whoa!" The witness thought that Hawkins told Henderson to back the horse, but the horse could have been just as easily led off the cistern. Morgan, the defendant, got out his knife at the point where the witness left the horse. When Henderson commenced backing the horse, the defendant told him two or three times to release his horse, and evidently meant what he said. The defendant took some apples out of his pocket at the time that he drew the knife. The apples fell to the ground, and were placed by some one on the scales. The deceased fell very heavily after he was struck. Witness did not know who got to Henderson first. He did not think that the horse struck Henderson's body in passing.

City Policeman A. J. Thorp testified that he was at the police station on the night of January 19, 1884, when a telephone message calling for police was received from Cloud's stable. Witness and Tom Johnson went immediately to the stable, where they found Hawkins in the office. Hawkins said: "I want you to arrest that man out there. Here is the man he has killed." Witness went to the defendant outside of the stable, and put his pistol to his breast, and Cloud pulled him, defendant, off his horse. Cloud said: "Look out; he will kill you." The defendant was then standing near the sidewalk in front of the stable hall door. Defendant was boisterous, and said: "Look out, G—d d—n you, I will kill you." Cloud and several parties witness did not know were standing around. Witness took a knife,

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the blade of which was bloody, from the defendant. The knife exhibited was similar in every respect to that knife. Defendant had no other weapon when arrested. He was quite drunk.

Doctor M. A. Taylor was the next witness for the State. He testified that Doctors Cummings and Stalnaker called him in attendance upon the man Henderson at Cloud's stable, two days after his injury. Witness was called to assist at trephining the deceased's head. The physicians named, with the witness, met at Cloud's stable about three o'clock p. m., on January 20, 1883. They found Henderson in a comatose state, and upon examination arrived at the conclusion that his brain was injured, and from what they could gather from persons about the stable they supposed the injury to be the result of a violent fall. The witness's impression, without making an examination, was that Henderson was suffering from concussion, the result of a fall backwards, and it was thought that a fracture was discovered on the back part of the head. The physicians present proceeded to make a trephine of the head, but found no fracture. They had made a mistake, supposing that a congenital defect or malformation of the skull was a fracture. Some relief resulted from the trephining, the witness was told, but he did not see it himself. Coma results from injury to the brain. In some cases—of slight concussion—the patient laboring under coma can be aroused and enabled to respond to questions intelligently. In severe cases the patient cannot be aroused. This was the condition of Henderson when the witness saw him, but the witness was informed that he aroused and spoke once after the trephining operation. The witness found and left the patient in the comatose state. No examination of the temple wound was made in the presence of the witness. The witness proposed an examination of it, but the other physicians demurred, fearing to injure it.

The witness was present at the autopsy at the city hospital, some six or seven days after the trephining operation had been performed at the stable. There were present at that autopsy Doctors Given, Gasser, Johnson, Cummings, Wooten and the witness. The object of the autopsy was to discover the cause of Henderson's death. In the opinion of the witness, death was the result of the thrust of the knife into the brain. The knife penetrated the brain at a point on the level, and nearly, perhaps an inch, in advance of the ear, directly in, and probably upward, and may be a little backward, not exactly on a true line, and the measure was between two and three inches. The in-

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cision was about an inch laterally. Such wounds are nearly always fatal. The witness saw such a knife on the examining trial as that exhibited to him now. The point of this knife is sharp, and the edge is turned as if it had passed over some resisting surface. The brain near the wounded temple was inflamed to some extent along the arachnoid spaces. The places trephined were also examined at the autopsy. It was the recollection of the witness that the surgeons present concurred that the cause of the death of Henderson was the wound in the temple. Trephine is often resorted to in cases of concussion of the brain, and is often beneficial. Witness knew of cases cured by trephining. Depression of the bone is the result of concussion, and trephining is a process to remove the depression, and in some cases is the only process available.

Cross-examined, the witness stated that injury to the cerebrum, or upper brain, is not so dangerous as an injury to the cerebellum, or lower brain. The dura mater is the brain covering that lines the inner part of the skull. The brain is of two colors, white and gray matter. The knife in this instance entered the left lobe of the cerebellum, slightly upward and backward from a true line. The entry of a knife or pistol ball into the cerebrum is not always fatal. In the experience of the witness as a surgeon, he had never known of the recovery of a patient whose brain, at the back part of the head, was touched through the dura mater and the pia mater. According to the recollection of the witness, there was a concurrence of opinion among the physicians present at the autopsy as to which part of the brain was penetrated by the knife, and that part, according to his recollection, was the cerebellum. The brain was before the physicians, and the nature of its injury was discussed. The witness was not one of the operators at the autopsy, and did not know that there was a wall of healthy brain matter between the track of the wound and the cerebellum. Witness was present when the discs were taken from the skull at the back of the head. Doctor Cummings, who operated at that time, was the only physician present besides the witness. Witness at that time made only a casual external examination of the head, but thought he discovered a fracture with his fingers.

The witness gave a technical description of the different parts of the brain and skull, and said that, believing they had found a fracture, Doctor Cummings performed a trephine operation, which failed to disclose a fracture. Thinking they had mis-

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taken the location of the fracture, the skull was trephined the second time with like result. The witness took no part in the operation; that is, he did not manipulate the instrument at all. After the second disc was removed without exposing a fracture, the witness was unwilling to experiment further with the trephine. It was developed on the autopsy that the theory of a fracture was a mistake. When the two trephine operations failed to disclose a fracture, the witness and Doctor Cummings became satisfied that the basis of the operation was a mistake. The witness thought at the beginning of the operation that the wound in the temple should have been examined. Witness knew of no surgeon examining the wound in the temple. No bruised condition of the scalp was found before the trephining operations were performed. The process of trephining over the cerebellum is dangerous though admissible practice. It is dangerous, even though it does not wound the membranes of the brain, inasmuch as it may produce inflammation. Wounding of the dura mater increases the danger; wounding of the arachnoid makes the danger greater, and the wounding of the pia mater still greater. In performing the trephining operation in this case, the dura mater was very slightly cut—not cut through. There was a very little blood found in that locality. The difference between the brain at that time and at the autopsy was very little. Very little, if any, blood was drawn by the trephining operation. Where the skull is cut through, and both the dura mater and pia mater are cut through, or punctured so that blood will ooze brainward in such quantities that it could be removed with the finger, the patient will die. There have been cases of recovery from wounds in the cerebrum. Ordinarily, with any degree of care in the attending physician, the piece of fractured skull the witness saw in the temple bone at the autopsy would have been discovered.

In answer to the question if the failure to discover the fracture of the temple bone was not the result of gross negligence, the witness said that he would so consider it in the physician first called, but there was an apology for a subsequent physician. If witness had been called to examine the wound in the temple—the only apparent wound—he would have examined it. It ought to have been examined. The witness had no conversation with Doctor Wooten before the autopsy. In his former examination the witness may have stated that he thought the fracture followed a certain course and could not be defined. The trephin-



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ing operation did not produce the death of Henderson. More time would have been required for that operation to have resulted in death. Inflammation had not progressed to a fatal extent. Witness noticed the condition of the brain where it was penetrated by the knife. It showed some trouble, and there was more or less extravasation of blood. Witness did not take the dura mater in his hand at the autopsy. Witness thought some one of the doctors present took the scalpel and flirited blood from the brain in very small quantity.

A. J. Daugherty testified, for the State, in substance, that he was at Cloud's stable at the time of the tragedy. He was standing in the office when the defendant rode into the stable, talking boisterously, and denouncing some one, whom he said wanted to visit his sister, but who was totally unworthy. It was the impression of the witness that the defendant was talking to Buck Watkins about some body else. Defendant and Watkins, when witness first saw them, were standing near the door which led into the yard. Watkins seemed to be trying to get defendant to go out, and got him to a point near the front door, when Henderson came up and placed one hand on the horse's neck and the other on defendant's thigh. Defendant had some apples in his hands, which he offered Henderson, but, Henderson refusing them, he either threw or dropped them on the ground. Hawkins picked the apples up and offered them to the defendant, who rejecting them, Hawkins placed them on a chest that stood near. Henderson took hold of the defendant's horse and tried to lead him out. Witness, seeing that the defendant was under the influence of whisky, and not caring to see too much of what might happen, walked off. At the door of the stable he turned and looked back and saw Henderson lying on his back. The defendant yelled once and rode out of the stable. When he got outside he turned his horse about half way round and said: "Here I am. If any of the rest of you want me, come out here and I will get some more of you." This was followed presently by the breaking of the window, which witness and others at the time took to be shooting. The defendant was cursing all the time, but did not seem to be cursing Henderson. On the contrary, witness, as long as he saw defendant and Henderson together, thought they were on good terms.

The testimony of Martin Langford, the next witness for the State, was, in substance, that he was present at Cloud's stable at the time of the cutting, but could not identify the man who

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did it. He had never seen him before. Witness saw a young man in the stable on a horse, cursing violently. The man on horseback passed through the stable into the wagon yard, and got into a dispute with the yard man. Presently the yard man came into the stable, followed by the man on horseback. Buck Watkins met the man near the stable door, took hold of his horse, and asked if he wanted his horse put up. The man said that he did not. Watkins then told him that he must either put up his horse or go out. Hawkins then whipped the horse and tried to drive him out, Watkins at the same time trying to lead the horse. The man then said that he wanted to see Captain Cloud. Hawkins went off to call Cloud, and about this time Henderson came up and said to Watkins: "Turn this fellow over to me; I will take care of him." Watkins released the horse, and Henderson asked the man if he did not want to put his horse up. The man said that he had no money. Henderson replied that it made no difference. But the man still refused. Henderson then seemed to try to get the man out by pulling at his horse. The horse then backed out of witness's sight. He came forward presently, and the witness saw the man cutting at Henderson. He saw the knife blade flash in the gas light. The man said that he would shoot if Henderson did not release his horse, but the witness saw no pistol. When hit, Henderson let go the rein and fell. The man rode out of the stable, saying: "I have got one of you, and if there is any more of you, come out."

The cross-examination of this witness was a reiteration of his testimony in chief, with somewhat more of detail, but developed no variance. He stated that he was certain that it was Watkins who attempted to lead the horse, and Hawkins who struck the horse.

Doctor J. B. Cummings was the next witness for the State. He testified, in substance, that he was called to attend Henderson several hours after the wound was dressed. Witness did not see Doctor Stalnaker on that night, but the latter was present next day. When witness first saw the wounded man there was blood on his beard and about the bandage Doctor Stalnaker had put on his head, which was much soiled. Witness tried to wash the blood off, clipped the whiskers, and ordered cold cloths put on the wound. This first visit was at night, at a time when it is very difficult to take up the small arteries in the temple, and as Doctor Stalnaker had already examined the wound, and as

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the patient was in a comatose state, the witness did nothing more then. Not liking to interfere, the witness did not go to see the patient next day, until he was sent for at twelve o'clock. Henderson had a violent convulsion as witness entered the door, which he relieved by a hyperdermic injection of morphia. Witness also observed paralysis. It appeared to the witness that the wound in the temple was too low to involve the brain. Witness was told the man fell heavily, and observed the hard nature of the ground. He then examined the back part of the head. Witness saw Henderson often after that up to his death. He remained in the comatose state, but was several times partially aroused, after the trephining operation. He could take a little water, swallow, and partially understand, and seemed at times to respond to impressions made on him.

The witness was present at the autopsy, and had occasion to examine the temple wound at that time, and found upon that examination that the knife had penetrated a very thin part of the temple bone and passed into the brain about two and three-fourths inches, describing the course stated by Doctor Taylor. Witness noticed extravasation of blood about the ventricle of the brain, and observed that supperation had taken place along the track of the wound. The effect of this condition was to congest the entire brain, produce inflammation and certain death. The coverings of the brain are very vascular, and any wound to them may affect the entire brain. Witness saw the knife exhibited, after the death of Henderson. The blade is bloody, and the edge is turned in a manner that might have been done by striking a bone. The point of the blade of the knife penetrated nearly to the lateral ventricle, involving it in the congestion. The effect of such congestion is almost invariably to produce death within eight days. This wound, in the opinion of the witness, penetrated only the cerebrum. The congestion almost entirely resulted from the temple wound—very little from the trephining operation.

Cross-examined, the witness said he was called to Henderson about midnight on the night he was cut. Witness was city and county physician. He made no further examination of the temple wound that night than to remove the first and place a second bandage on it, and order cold applications. He did not insert his finger into the wound. Witness went back at midday next day and found the patient in convulsions. He sent for Doctor Stalnaker, who first attended him. He and Doctor Stalnaker

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examined the back of the head, but not the temple wound. Witness thought he found injuries in the back of the head. The conclusion was reached that this supposed injury in the back of the head was the cause of the patient's condition, and that the trephining operation might give relief. Witness called Doctor Taylor to assist in the trephining operation at two o'clock, and sent for Doctor Stalnaker, but did not secure him. Witness thought Mr. Sprinkle was present during the operation. Mr. Cloud may have passed in and out during that time. No bruise of any kind was found on the scalp. The scalp was smooth and natural, a condition, however, not incompatible with the theory of a serious bone injury. This witness described the trephine operations substantially as Doctor Taylor did, and said that in locating a fracture at the two places where they took out discs of the skull they were mistaken. The witness then came to the conclusion that the fracture was too extensive to interfere with further, and held to this opinion, in which he believed Doctor Taylor concurred, notwithstanding the trephining process disclosed no fracture. The witness entertained this opinion because it seemed to him that the entire section of the skull moved under pressure of the fingers. It was his recollection that the elevator was used in trying to determine whether or not the skull moved. The scalp was sewed up after the trephining operation was performed.

The witness at no time examined the temple wound. He did not in fact think at that time that that wound accounted for the patient's condition. The trephining operation was performed on January 20, 1883; the patient died on January 25, and the autopsy was held on January 26, the witness, and Doctors Taylor, Given, Gasser, Wooten and Johnson, and Messrs. von Rosenberg, the justice of the peace, and S. G. Sneed, being present. The witness made the usual incision, stating to the parties present, when he first took the knife to perform the operation: "I will now show you where the real difficulty is," still adhering to his former impression. He did not think he said: "I will show you that there is no fracture in the temple," although such was his impression. When witness saw the hole in the temple he first discovered that there was a fracture there, and turning to Doctor Taylor, he said: "Doctor, we have made a mistake." It was then disclosed that a congenital deformity had misled the witness and Doctor Taylor. After this the witness removed the brain and it was examined; the knife was found to have penetrated the cerebrum two and three-quarters inches,

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and approached one of the ventricles very near, but did not cut it. It was the opinion of the witness that that wound (in the temple) congested the entire brain. In performing the trephine operation, the witness wounded a membrane just a little at one point. He noticed that wound at the time of the operation and again at the autopsy. There was very slightly more congestion at that part of the brain than elsewhere. The witness did not think there was any extravasated blood under the dura mater nor under the pia mater. It was his impression that the blood was confined to the vessels of the pia mater.

The witness thought he saw some one of the physicians try to throw blood from that point, but he threw out very little. The presence of blood at that point was not dependent on a wound there. It might have been forced there by gravitation. That physician said that that blood was freed from the blood vessels, but the witness had his own opinion about that. "I saw him interfere with the general arrangements of the parts there, and pick out some of that vascular texture in the little depressions of the brain, but he had to go between them. All over the brain that redness existed, and you could have picked it out at any part of the brain in the same manner, but I do not think the vessel was broken before he took the knife and picked it out. The blood, if coagulated, would not flow. This was not more coagulated than any other blood vessel." To the question, "Doctor, do I understand you to say that Doctor Wooten broke a blood vessel, and held up blood from it?" the witness replied: "I say there was net work, and he took up net work, including this blood." The defense asked: "Is it not true that Doctors Wooten, Given and Johnson found blood in that part." Answer: "There was general congestion, and it was also upon the opposite side. They have their opinion, and I have mine." The witness had no recollection of flipping out blood himself that had been freed from the vessels and coagulated at that point, nor did he see it done by any one else, except in the manner described. The trephining process produced no abscess, nor any evidence of inflammation that would show a serious result. The autopsy disclosed that the fatal wound was in the temple. It showed that no serious consequence followed the trephining operation that could result in death or fatal injury.

Doctor J. J. Gasser testified, for the State, that he was present at the autopsy by invitation of Doctor Cummings. He witnessed the operation and formed a satisfactory conclusion as to the

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cause of death. Death was the result of a wound extending through the left temple into the brain about two and a half inches. Such a wound would produce general paralysis. After the brain was taken from the skull Doctor Wooten cut off the left side of the brain, slice after slice, until he came to the wound. The color there was a dark red, indicating gangrene. The brain matter at a distance from that point appeared normal. The dura mater, etc., showed congestion. It showed injury in the back of the head from the trephining operation. This was near the occipital suture. The wound went near to the ventricle, and the discoloration reached the centre of the brain. A piece of skull was loose in the hole made by the temple wound. In the opinion of the witness, the wound in the temple killed Henderson.

On cross-examination, the witness gave a lengthy technical description of the various parts of the brain, and spoke of the various parts with regard to their comparative sensitiveness to injury. He reiterated that, in his opinion, the death of the wounded man resulted from the wound in the temple. There was a little perforation of the dura mater, and it showed a little redness, covering a space of little over half an inch, in which the redness was a little more obvious than elsewhere. Witness could not see that the injury occasioned by the trephining operation was sufficient to account for the condition of the brain. He could not say that the injury in the back of the head, in connection with the wound in the temple, contributed to hastening Henderson's death. Witness saw no coagulated blood, nor did he see any clotted blood thrown out. A wound in the cerebrum is not necessarily fatal. The trephine in this case was on the posterior lobe of the cerebrum, extending towards the cerebellum. The State closed.

S. G. Sneed, the uncle of the defendant, was his first witness. He testified that he was a lawyer by profession, but followed the life of a teacher and student. He kept himself well posted in matters of science by reading, and esteemed himself well versed in true science. He was present at the autopsy, at which were also present Doctors Taylor, Cummings, Gasser, Given, Wooten and Johnson, and one or two attendants. Doctor Wooten asked the question whether or not Doctors Taylor and Cummings had removed all the bone. It was replied to in the negative, with the statement that the fracture, after trephining, was found, by using the elevator, to be too extensive. Witness had gone for

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the purpose of seeing exactly the true condition of the brain, and accordingly placed himself on the table on which the body lay. Doctor Cummings operated, saying, as he exposed the two holes: "Here is the injury, but I will now show you the other wound." As soon as the scalp was turned down enough to expose the wound in the temple, it became apparent that the skull had been broken through, and a piece of the bone was detached and lying in the wound. Thereupon Doctor Cummings turned to Doctor Taylor and said: "Doctor, we have made a mistake;" to which Doctor Taylor assented. Doctor Cummings then sawed off the skull and took out the brain, and the physicians proceeded to examine it. The wound measured two and a half or two and three-quarter inches. The course of the wound was laid open and found to be highly inflamed and decomposed.

The membranes under the point trephined were cut through, and the surface next to the wound was reddened to the extent of two and a half or three inches. The wounded point was under the base of the skull, and the witness thought that Doctor Cummings took the handle of the knife and removed some clots of blood from the convolutions of the brain at that point. The witness did the same thing, and was of impression that others did. It seemed to be agreed that there was no injury of any kind to the back of the skull, except that produced by the trephining. The membranes were torn away, exposing the brain itself. There was one or more inches of perfectly healthy brain matter between the front brain and the cerebellum. The blood witness took out and saw taken out was taken from under the pia mater, and from the convolutions of the brain. There was about two and a half or three inches of inflammation around the wound in the back part of the head. There was a free space between the two wounds, in which there was no inflammation. There was considerable space between the temple wound and that in the back of the brain, in which there was no blood in the convolutions. Between the cerebellum and the place where the blood had coagulated, there was a clear space of two and a half or three inches. The blood was not in a very strong coagulum, but flipped out easily. There was no connection between the base wound in the cerebellum and the temple wound. The trephine wound struck just above the cerebellum. The coagulum and inflammation were co-extensive, and extended from the wound in the back of the head over part of the cerebellum.

Cross-examined by the State, the witness said that the three

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membranes of the brain were penetrated by the temple wound. The track of the wound was discolored, the reddish color being intense in the center, diminishing as it left the track of the wound. In the anterior it was red, and gradually ran itself out until it disappeared. It was distinctly understood between the physicians present that the knife wound did not reach the cerebellum.

J. P. Sprinkle was the next witness for the defense. He testified that he was present when the trephining operation was performed by Doctors Cummings and Taylor, and described the manner of operation. The witness noticed the scalp before the discs were taken out. He saw no bruises of any kind on the back part of the head. He noticed the skull, and saw no fracture of any kind. It looked perfectly sound and healthy. He saw the brain after the pieces of skull were lifted out by the use of the elevator in the hands of the doctors. It looked perfectly natural to the witness. The holes described were cut into the back part of the head.

I. S. Albin was the next witness for the defense. He testified that he was in Cloud's stable on the night that Henderson was thrown down. Witness first saw the defendant and Watkins together, near the door leading from the stable into the wagon yard. They were going toward the front door, quietly, Watkins leading the defendant's horse. Watkins said something to the defendant about going out, and defendant replied that he would go anywhere with Watkins. Shortly, some one went to where defendant and Watkins were. In a few minutes more, Henderson came in through the east door, caught defendant's horse by the bridle, and said: "Hallao, pard." Some conversation of a general character passed between them, but nothing indicating ill feeling. Defendant presently pulled some apples from his pocket and dropped them. He asked Henderson if he belonged to the stable. Henderson replied that he was at work there. Defendant replied: "Then stand over by that gentleman there," pointing toward Watkins. Henderson then remarked: "You don't call that man a gentleman, do you?" Defendant replied: "Yes, I call him a gentleman." Henderson, with an oath, said: "He's the biggest rascal in town." The defendant then told Henderson to release his horse. Henderson jerked the horse violently, calling out, roughly: "Whoa! whoa!" He pushed the horse back violently, and the defendant told him twice, perhaps three times, to release the horse. Henderson,



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pushed the horse very roughly some distance, partially into a stall, when the horse came near falling down. The horse plunged forward, and the witness saw Henderson fall. Witness thought the horse knocked him down.

Witness was the first one to reach Henderson, and, unaided, raised him to a sitting posture. Witness called for help but received none. Hawkins did not aid in raising Henderson, or in supporting him in a sitting posture. Defendant rode out the east door when Henderson fell, saying: "I told you to turn my horse loose, and you would not do it." The horse's feet were not on the cistern nor were his hind parts quartered in that direction.

Cross-examined, the witness said that he saw no knife in the defendant's hand. He saw the defendant strike at Henderson three times, but he was of impression that Henderson was knocked down by coming in contact with the horse. The first blood the witness saw was under Henderson's head, on the ground. He saw no wound until Henderson had been taken into the office. He then saw what he took to be a knife wound in the temple. Shortly before the cutting the witness saw Hawkins in the stable, but did not hear him tell Henderson to hold defendant's horse until he went for Cloud, nor did he hear him tell Henderson not to let the horse get on the cistern. Henderson was trying to hold the horse, and defendant was pulling back. Henderson was pushing the horse roughly into the stall, and the horse was bounding forward when the defendant struck. Witness had no idea at the time that the men were in an angry struggle. Witness had talked to Cloud in a general way, with people around, about the occurrence.

Joseph Heffington was the next witness for the defense. His testimony was substantially the same as that given by the witness Albin on his examination in chief. He thought that when the horse bounded forwards, at the time that the defendant struck at Henderson, Henderson struck back. His impression was that the struggle was a good natured one, and when Henderson fell he thought the horse knocked him down. Going out the defendant said: "I told you to let my horse loose, and you would not do it. If any of you want me, here I am." The witness did not see Hawkins have hold of the defendant's horse at any time that night. He did not hear Hawkins tell Henderson not to let defendant's horse get on the cistern. He saw nothing in the defendant's hand when he was striking at Henderson.

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Doctor T. D. Wooten was the next witness for the defense. He testified that he was present at the autopsy. He saw a short incision in the left temple, and in the rear, a little to the left of the median line, found another incision, where the skull had been trephined. The cranium was then opened by Dr. Cummings, and the condition of the skull was exposed. Examination disclosed that the skull had been penetrated through the left temple, making a fracture one inch across the external ear. Two small discs had been trephined out of the back part of the skull. The brain was then exposed by sawing off the skull. The instrument that made the temple wound penetrated the brain about two and a half or three inches in an inward, backward, and slightly upward direction. Along the path of the temple wound, suppuration had intervened, and there was some matter in the back of the head under the trephine. Some blood had extravasated under the membranes. The instrument passed in the neighborhood of one of the lateral sinuses, but the cavity was not involved. There was neither inflammation nor excessive serum in the two cavities of the brain.

The triangular opening at the temple was made by driving in a piece of the skull. It was a triangular piece of bone, about an inch from the base to the apex of the triangle, and was projecting to a certain extent into the brain matter. There was some evidence of extravasated blood at the temple fracture. Under and in the vicinity of the trephine there was extravasated blood beneath the pia mater, on the surface of the brain matter, and there was some extravasation between the pia mater and the arachnoid. Extravasation is where a vessel has been broken and the blood is flowing out. In this instance it was extravasation into the brain. The three brain coverings, the dura mater, the arachnoid, and the pia mater, were cut by the trephine. There was congestion along the track of the temple wound. There was inflammation about the wound in the back of the head, and it extended forward. The inflammations from the two wounds, though extending toward each other, did not meet. Between the two was a space of brain in a normal condition. At the temple wound, a piece of skull was projecting into the brainy substance, point foremost, which was very injurious, being calculated to produce inflammation. A wound in the cerebrum is not necessarily fatal.

From his examination of the temple wound, the witness judged that if the fragment of skull had been removed, and the patient

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subsequently been properly treated, he might have had a chance to recover. That bone should have been removed. The trephine wound had not progressed far enough to destroy life. The injury in the temple had. There were evidences of progress of inflammation from the wound in the back part of the head, but the witness could not say what would have been the eventual result of the trephining operation. The inflammation from the temple injury did not extend to the cerebellum. The wound behind was in the superficial covering of the brain. Witness had frequently performed the trephine operation. Trephining is regarded in surgery as a dangerous operation, but not extremely so, when carefully performed. It is resorted to when the skull is broken and depressed, and it becomes necessary to remove the depression. Inasmuch as the trephining operation in this case must necessarily have weakened the patient's powers of resistance, the witness was satisfied that to that extent it hastened the man's death. The condition of the brain in the rear could not have resulted from the temple wound; it was entirely unaffected by the temple wound. The conditions of the brain, front and back, were entirely different and distinct, and they were separated by a space of unaffected brain matter. The cerebellum is more sensitive to injury than the cerebrum. There is much more danger in trephining over the base of the brain than over the anterior portions. The witness had never seen a fracture of the prominent protuberant part of the rear skull that was not produced by ball, bullet or shot.

A force applied at the back of the head will frequently fracture the skull in front. The witness had never had occasion to trephine the back part of a skull, and had never seen that part of a skull trephined. A grape shot or pistol shot, or kindred injury, might create an occasion for trephining the back part of a skull, but perhaps no other kind of injury to that part would. The witness thought it impossible for a fracture of the back part of a man's skull to exist without leaving some external evidence on the scalp. Doctor Cummings said, at first, at the autopsy, that it was hardly worth while to remove the scalp, as the wound in front was merely superficial. Witness advised the removal of the scalp before examining the rear wound, and Doctor Cummings did so. The removal of the fractured bone in the temple would have imparted additional chance of recovery to the patient. It would not have been necessary to trephine the temple. The necessity for trephining does not exist when the surgeon can

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get under the bone and remove it. In this instance the fractured bone could have been removed. While sitting on the hospital gallery, Doctor Taylor remarked that this skull was fractured in the rear, and that the skull had been trephined in that section, but that the fracture was so extensive it could not be raised; that in boring through the skull the fracture was found to be very large, so large that it would expose a large surface of the brain, and the trephining was abandoned. There was no abnormal condition of the brain behind except that explained by the trephining operations. There was a little larger protuberance of the skull than is usual, but not enough to be decided. It is rarely that a head is found perfectly symmetrical in that section.

Cross-examined, the witness stated that inflammation from the trephining operation had not proceeded very far. The wound in the temple caused the death of Henderson.

Doctor James G. Given was the next witness for the defense. He was present at the autopsy, and his statement was not immaterially variant from that of Doctor Wooten, though he went somewhat more into detail. Doctor Cummings appeared considerably surprised when the incision in the temple was discovered. The broken bone at the temple projected into the brain, the other end remaining lightly attached to the skull. This wound passed near but did not injure the ventricle. It was some distance, two and a half or three inches, from the cerebellum, in the anterior lobe of the cerebrum. On the back of the head were found two holes, or discs, made by the trephine, around which was considerable inflammation, and blood poured out. One of the teeth of the instrument had cut the superior longitudinal sinus. The trephine passed through the three membranes of the brain and touched the brain itself. Extravasation was found in the convolutions of the brain in the region of the trephine operation. The space radiating an inch and a half from this point of injury was bloody, the result of the inflammation from the trephine, and some blood was thrown out. Coagulated and clotted blood was found on the brain, underneath the pia mater. The trephine wound in the back of the head was very serious in its nature; its effect was to materially damage the patient's vitality. It had a very injurious effect on the patient, owing to the primary wound, and, in the opinion of the witness, it shortened the patient's life. The witness never but

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once performed the trephine operation. He had never before known it to be attempted on the back of the head.

A trephine near the base of the skull is more dangerous than one further removed from the base. Injuries near the base of the brain are usually fatal, and a fracture of the base is fatal. The nearer to the base the more dangerous the wound. By the "base" is meant the front of the cerebellum. The knife or temple wound entered about two and a half inches from the cerebellum. The wound in the back of the head was about the line of the cerebellum. From this rear wound the lower portion of the cerebrum and the upper part of the cerebellum were inflamed, and the witness was of opinion that this inflammation of the cerebellum depleted the patient's chance of recovery. The temple wound in this case was, in the opinion of the witness, the mortal wound.

Doctor R. J. Johnson testified, for the defense, that he was present at the autopsy, and examined the patient's skull, etc. There were two trephine discs on the back part of the skull, and under these discs the three membranes had been cut by some instrument. Clotted blood extended around the openings as a centre for about an inch on every side. Witness threw some of this blood out with his fingers. The extravasation had sufficiently advanced to be flipped out. After getting under the pia mater it was not necessary to break anything in order to get the blood out. The blood was extravasated, was on the brain, and was not vein blood. Witness was present at the conversation between Doctor Wooten and Doctor Taylor on the gallery before the *post mortem* was commenced. Witness did not remember all of that conversation. He did remember Doctor Taylor saying, in reply to an inquiry of Doctor Wooten, that the autopsy would disclose a fracture in the back of the head, and that the said fracture was too large to be covered by trephining. He heard Doctor Cummings say, when he took up the knife to commence operating: "We will now see that the injury is in the rear of the head, and that there is a fracture there."

It was admitted that the horse ridden by the defendant on the night of the tragedy was a horse known as "Bill," which had belonged to the late Captain Thomas E. Sneed, senior.

Captain T. E. Sneed was the next witness for the defense. He testified that he knew the horse Bill, ridden by the defendant at the time of the cutting. That horse belonged to the estate of the witness's deceased father. He was a horse of high metal, and was very sensitive about his hind quarters; so much so that

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he would not endure harness or breeching. Witness remembered the witness Hawkins who testified on this and the former trial of this case. He remembered his testimony on the former trial. He took notes of his testimony then, and has the notes yet. With reference to the manner in which the defendant's horse was conducted from the rear to the front of the stable, Hawkins, on the former trial, testified, substantially, that he ordered a man whom he called the "Dutchman," the yard man, back into the yard, and directed Buck Watkins to lead the horse out of the stable; that Buck Watkins took hold of the bridle and he, Hawkins, went behind the horse and slapped him up, to make him go on toward the door, and the horse was thus carried to a point near the door.

Doctor Stalnaker, now dead, of whose testimony on the former trial of this case the witness took notes, testified on that trial that, being sent for to attend Mr. Henderson on the night of his injury, he found Henderson in bed in the office at Cloud's stable; that he found an incised wound in the temple somewhere in the neighborhood of an inch in length; that it was bleeding, and he inserted his finger into the wound, not so much for the purpose of examining the injury as stopping the hemorrhage, and for the purpose of compressing any vessel that might have been cut, and by that means stop the hemorrhage; that when he inserted his finger he felt some spicular, but made no further examination of the wound, and pressed the lips of the wound together without using adhesive plaster, having none with him; that he then put a compress around the bandage to hold it firmly. He further testified that he was called for next day, but learning that Mr. Henderson was poor and unable to pay for medical services, he suggested that Doctor Cummings, the city physician, who was charged with the care of such cases, should be called in, and that he saw the patient no more after he turned the case over to Doctor Cummings.

Cross-examined, the witness stated that Doctor Stalnaker testified that, when he was called that night, he was informed that Henderson had struck his head violently on the hard surface of the stable floor, and that he attributed the condition of the man to the concussion produced by the fall. He testified that he called next day, but the witness did not remember what he testified in regard to Henderson's condition at that time.

S. O. Cloud testified, for the State, in rebuttal, that he saw the witness Albin for the first time on the night of the cutting.

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Albin was at the stable at the time it occurred, and was the first man to speak to the witness about the difficulty after it was over. A great many parties were in the stable at the time. Albin gave pretty much the same account of the affair as was given by the witness Hawkins. He told the witness that the defendant said he had killed one of the d—d rascals, and that he would kill another one.

Cross-examined, the witness said he was at supper when the cutting occurred. Several parties talked to witness about the matter, and he thought they all told pretty much the same story. Witness saw the defendant trying to ride into the house, and was quite angry. Witness had not, that he knew, met the man Albin until that evening. Three or four other parties whom witness did not know had stopped at the stable.

The original and amended motions for new trial presented the questions considered in the opinions.

*Walton & Hill* and *Sheeks & Sneed* filed able and exhaustive briefs and arguments for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

HURT, JUDGE. The appellant in this case was convicted of murder in the second degree. A reversal of the judgment is sought on three grounds:

1. Error in the admission of certain evidence.
2. Defects in the charge of the court in two particulars.
3. Error in refusing charges requested by the defendant.

First ground: The witness Cummings, M. D., stated that he believed that the wound in the temple, and not that inflicted by the trephining operation, killed the deceased. He was then asked by the State's counsel if this conclusion was concurred in by the other physicians present, viz: Taylor, Wooten, Given, Johnson and Gasser. To this question the defendant objected, because the desired evidence was hearsay. The objection was overruled, and the witness answered that the opinion which he had given as to the cause of the death was concurred in and agreed to by the other physicians before named at the time of the *post mortem* examination.

We are of the opinion that the objection of the defendant should have been sustained. This evidence was clearly hearsay, and not admissible. But, as all of these physicians were ex-

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amined as witnesses, and testified that, in their opinion, the wound in the temple, and not the trephining operation, caused the death of the deceased, certainly no injury appears to have been done the defendant by its introduction.

Second: Error in the charge in the first particular, viz: that in the ninth subdivision of the charge implied malice is explained as follows: "Implied malice is an inference or conclusion of law upon certain facts found by the jury. Thus the law implies malice from the unlawful killing of a human being, unless the circumstances make it *evident* that the killing was either justifiable, or, if not justifiable, was so mitigated as to reduce the offense below murder in the second degree."

The proposition contained in this charge is simply this: That when an unlawful killing is shown, the homicide is presumed by law to be upon malice, and in order to meet and overcome this legal presumption, the evidence—circumstances—must make it *evident* that the killing was justifiable, or so mitigated as to reduce the offense below murder in the second degree. The appellant objected at the time to this charge. Is it obnoxious to the objection urged to it in the appellant's brief? Does this charge shift the burden of proof? We think not. Does it infringe the doctrine of reasonable doubt? We are of the opinion that it does, and this is so, and is susceptible of the clearest demonstration.

Let us illustrate: A is charged, and is on trial for the murder of B. The State proved that A unlawfully killed B, and here closed. A adduces evidence and circumstances tending to justify or reduce the homicide below murder. Must his justification be evident? Or must the evidence and circumstances render evident the fact that the homicide was not upon malice, but was manslaughter or negligent homicide? Suppose that neither justification, manslaughter, nor negligent homicide is by the evidence made evident; but suppose the evidence adduced by the State or the defendant which tends to support justification, manslaughter or negligent homicide is sufficient to raise a reasonable doubt of the existence of malice, sufficient to warrant the jury in calling in question this legal presumption. Should the jury find malice and convict of murder? Evidently they should not. A preponderance of evidence in support of circumstances which tend to justify or reduce is not required, the correct proposition being that the State must prove malice, and that if there be a reasonable doubt of its existence, either from



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the evidence or from any evidence, whether adduced by the State or by the defendant, he cannot be legally convicted of homicide upon malice.

Let us view this subject in another light. An indictment for murder charges at least three distinct offenses; while it charges others, three will suffice for the present purpose, to wit, murder in the first degree, murder in the second degree, and manslaughter. Now, the defendant is notified and called upon to answer each of these offenses. And the State, under these charges, can and must prove one of these charges, beyond a reasonable doubt, to be entitled to a conviction. These charges, or one of them, viz, murder in the first degree, murder in the second degree, and manslaughter, though contained in the same indictment, and though the trial may be upon all at the same time, must be established by the same character of proof—proved in the same manner—as if the trial was upon an indictment which charged but one. And in order to convict of the highest, viz, murder in the first degree, the burden is upon the State to show that the homicide was committed under such circumstances as to constitute murder of the first degree. And so with murder of the second degree; proof must be made that the killing was upon malice, and this must be shown beyond a reasonable doubt. Just what facts will make such proof we are not now discussing.

To entitle the State to a verdict of murder in the second degree, she must prove that the defendant took the life of the deceased, and that the homicide was prompted by a wicked and depraved heart, void of social duty and fatally bent on mischief, that is, by malice. These facts are established by proof of the existence of facts and by proof of the absence of facts.

Again let us illustrate: A is upon trial for the murder of B, The State finds that A shot and killed B. This would be a very remarkable case if the evidence were to stop here—such a case as will never arise if prosecuted with the slightest attention, and hence we will not discuss such a case. But suppose that a witness were to swear that he saw B, standing on the street, and that A drew his pistol, and while B was standing on the street, A shot and killed him; and here the evidence closed. This being the case, all of the case, very evidently A would be guilty of homicide upon malice, for he who would shoot down a human being under these circumstances, certainly would be prompted by a wicked and depraved heart, a heart void of social duty and fatally bent upon mischief. But suppose B had been breathing

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out deadly threats against A, of which he had been informed, and that just before he shot, B did some act showing an intent to execute his threats? Here we find an issue for the jury, viz: was the homicide upon malice or in self-defense? and if there should be a reasonable doubt of the malice, A should be given the benefit of this doubt and acquitted of homicide upon malice. We could illustrate with reference to manslaughter and negligent homicide, in fact, to all offenses embraced in murder, but deem the above sufficient.

We are of the opinion that the charge was erroneous, and, as it was excepted to at the time, we are also of the opinion that it contained such error as requires the reversal of the judgment.

But it is urged that in *Sharp v. The State*, 6 Texas Court of Appeals, 650, this precise charge was, by the court, held sufficient. In this case it does not appear that the attention of this court was called to the word "evident." In regard to this charge the learned judge (Winkler) says that it sufficiently informed the jury as to what facts and circumstances would justify them in descending from the first degree and convicting of murder in the second degree, if, indeed, the defendant was entitled to a charge on that grade of offense under the proofs adduced. But if it was the intention of this court to hold that the word "evident" was properly used, and that in fact justification, or the reduction of the offense to manslaughter, etc., must be made evident by the evidence, then that case is overruled.

But again it is urged by the State that as the court charged the jury that if they had a reasonable doubt of the defendant's guilt of murder of the second degree they must acquit, that therefore the error above noticed was rendered harmless. These charges are in direct conflict, and as defendant objected at the time, and as we cannot say that the jury was not misled by the erroneous charge, we feel constrained to reverse the judgment.

The next ground of complaint to the charge is in reference to the twelfth and thirteenth subdivisions of the charge. On the nineteenth day of January, 1883, the deceased was stabbed with a pocket knife in the left temple. When struck with the knife the deceased fell to the ground, and, upon examination, was found in a comatose state, in which condition he remained up to his death, which was on the twenty-fifth day of January, 1883. On the twentieth day of January the surgeons performed the trephining operation, taking from the back part of the head two pieces of skull.

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The autopsy disclosed that the knife had entered through the skull and penetrated the brain about two and a half inches, in an inward, backward and slightly upward direction. Along the track of this wound in the temple it was suppurated. A triangular piece of skull, size and shape about one inch from the base to the apex of the triangle, was driven into the brain. There is no reason for doubt that the wound inflicted in the temple by the defendant produced the death of the deceased; all of the surgeons agree to this. Two of the surgeons, however, on the twentieth of January, mistaking an irregularity, a congenital malformation of the skull, for a fracture, operated by trephining, and two pieces of skull were taken from the back part of the head. To the wound in the temple nothing whatever was done except to bandage and keep it cool, when by proper treatment the piece of bone could have been removed, and a chance given the deceased to recover. That there is evidence in this record tending strongly to show that there was gross negligence and manifestly improper treatment of the deceased cannot be denied and must be conceded.

Under the above facts—all of the facts relating to the different wounds, their character and the negligence and their improper treatment—what instructions should be given to the jury by the trial judge? The appellant complains of the charges of the court touching this matter. What, therefore, did his honor below charge?

“3. Homicide is the destruction of the life of a human being by the act, agency, procurement or culpable omission of another.

“4. The destruction of life must be complete by such act, agency, procurement or omission; but, although the injury which caused death might not under other circumstances have proved fatal, yet if such injury be the cause of death, without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is *homicide*.

“5. The neglect or improper treatment referred to has reference to the acts of some person other than he who inflicts the first injury, as the physician, nurse or other attendant.”

“12. If the jury find from the testimony that the defendant, at the time and place as alleged in the indictment, with a knife did inflict the wound in the head of the said Joseph Henderson, as charged, and they further find from the testimony that there has been gross neglect or manifestly improper treatment of said

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Henderson, by any one or more of the physicians attending him, between the infliction of the wound and his death, which improper treatment or neglect, if any, caused the death of said Henderson, then the jury cannot find the defendant guilty of taking the life of Henderson. And if the jury so find from the testimony, then they will find the defendant not guilty. If the wound (if shown by the testimony) inflicted by the defendant upon Henderson was not in itself mortal, and Henderson died in consequence of improper treatment by his physicians, and not of the wound, then the jury will find the defendant not guilty.

"13. If the testimony should show that the wound, as alleged, was inflicted by the defendant upon the head of the deceased, and that on a subsequent day, and before the death of said Henderson, the physicians, in mistake as to the nature of the injury, operated upon the back part of the head of the deceased, and in so operating inflicted injuries to the head and brain of the deceased, and that the death of the said Henderson occurred on January 24, from the joint effect of said wounds inflicted by defendant and by the physicians, *then* the jury must be satisfied from the testimony that the wound inflicted by the defendant was clearly a sufficient cause of the death without the concurrence of that by the physicians, and if the jury so find they will find the defendant guilty. But if the death of Henderson is shown to have been caused by the joint effects of the wound inflicted by the defendant and that inflicted by the physicians, and it should not be made clearly and satisfactorily to appear that the wound inflicted by defendant was sufficiently a cause of the death of Henderson, then the jury should acquit the defendant."

Do these charges of the learned judge inform the jury correctly of the rule by which they are to be governed in determining whether or not defendant destroyed the life of the deceased, Henderson? We are of the opinion, keeping the facts of the case upon this point before us, and as directly applicable thereto, these charges, taken together, contain a full, clear and concise statement of the law, and that there is no error apparent to us.

But suppose, it may be asked, that there was gross negligence or manifestly improper treatment by the attending surgeons, the wound not being necessarily mortal, can the defendant be convicted of the homicide? Now, before proceeding to answer this question, we desire to make these observations:

1. A wound is mortal when beyond the skill of surgery. It

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is mortal, because death is inevitable from the nature of the wound.

2. A wound is mortal unless relieved by surgery. Now, if A inflicts a wound upon B from which there is no chance of recovery, aided by the most skillful surgeon, and B dies, A is guilty of the destruction of B's life. But suppose that A inflicts a wound upon B from which he might be relieved by rational surgery, but, unless aid is given, B must, from the very nature of the wound, die, and aid not being given, B dies. will any rational mind question the fact that A destroyed B's life? The condition in which A placed B is that which must lead to death, and that which did lead to death. Now, can it rationally be contended that, as B, by proper treatment, might have been relieved, therefore A did not destroy B's life—that A did not kill B? Who will assert such a proposition? If, therefore, A did kill B, must he escape because of the gross improper treatment of the surgeons, when in fact he destroyed the life of his fellow man? The plainest principles of justice revolt at such a conclusion. On the other hand, suppose that the wound or injury inflicted, in conjunction with the improper treatment, produced the death, the wound not being necessarily mortal, should the defendant be held responsible for the homicide? Clearly not, nor is he so held in the charge of the court, the jury being told in the charge, under this state of case, to acquit.

Again it is urged, as there is evidence tending to show that the wounds inflicted by the surgeons weakened the patient and lessened his vitality, that although the wound inflicted by defendant destroyed the life of the deceased, that being aided in this manner by the wounds inflicted by the trephining operation, the defendant cannot be held responsible for the homicide. This proposition is not supported to its full extent by evidence. Doctor Wooten swears that the patient was weakened, and that his vitality was lessened, but he is very clear and positive that the patient died of the wound given by the defendant. And not only so, the evidence is conclusive that of this wound death was inevitable, unless relieved by surgery, and, to produce death, the wounds inflicted by the surgeons in the trephining operation would have required several days time.

We must not lose sight of the plain and practical question, which is: Did defendant, unaided, destroy the life of the deceased Henderson? If he did, he should be held responsible for the homicide. If not, there being evidence of gross negligence,

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and manifestly improper treatment by the surgeons, he should not. This question, we think, in all phases was correctly submitted to the jury by the very clear and concise charge of the learned judge who tried this case. It follows that, if the charge of the court was correct, full and complete upon this subject, there was no error in refusing the charges requested by the defendant.

Other objections to the charge have been considered by us, but we do not think them well taken.

For the error in the charge of the court relating to implied malice, or murder in the second degree, the judgment is reversed and the cause remanded.

**WILLSON, JUDGE.** Whilst concurring in the disposition made of this case, I do not agree to that portion of the opinion which approves as correct law the twelfth and thirteenth paragraphs of the charge of the learned trial judge, and which are quoted at length in the opinion of Judge Hurt.

In order that my views may be properly presented and understood, I will first refer to and state the common law upon the subject embraced in the said paragraphs of said charge, and then show wherein, in my judgment, the provisions of our Code upon the same subject prescribe rules in some respects essentially different from the common law, and from the charge referred to.

Mr. Greenleaf very tersely states the rule of the common law as follows: "If death ensues from a wound given in malice, but not in its nature mortal, but which being neglected or mismanaged, the party died, this will not excuse the prisoner who gave it, but he will be held guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death; for if the wound had not been given, the party had not died." (3 Greenl. Ev., sec. 139.)

Lord Hale states it thus: "If a man give another a stroke which, it may be, is not in itself so mortal but that with good care he might be cured, yet if he dies within the year and day, it is a homicide, or murder as the case is; and so it has always been ruled. But if the wound be not mortal, but with ill appli-



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cations by the party, or those about him, of unwholesome salves or medicines, the party dies, if it clearly appears that the medicines and not the wound was the cause of the death, it seems it is not homicide; but then it must clearly and certainly appear to be so. But if a man receive a wound which is not in itself mortal, but for want of helpful applications or neglect it turns to a gangrene or a fever, and the gangrene or fever be the immediate cause of the death, yet this is murder or manslaughter in him that gave the stroke or wound; for that wound, though it was not the immediate cause of the death, yet if it were the mediate cause, and the fever or gangrene the immediate cause, the wound was the cause of the gangrene or fever, and so consequently *causa causans*." (1 Hale, P. C., 428.)

The foregoing quoted texts are fully supported by other distinguished authors upon criminal law, and by numerous adjudged cases, both English and American. (1 Russ. on Crimes, 505; Roscoe's Cr. Ev., 717; 2. Bish. Cr. L., sec. 635 *et seq.*; *Com. v. Green*, 1 Ashmead, 289; *State v. Scott*, 12 La. Ann., 274; *Com. v. Hatchett*, 2 Allen, 136; *Parsons v. The State*, 21 Ala., 300; *Livingston's Case*, 14 Grattan, 592; *Com. v. Fox*, 7 Gray, 585; *State v. Morphy*, 33 Iowa, 270; *Regina v. Holland*, 2 M. & Rob., 351; Allison's Cr. L. Scotland, 147.)

This common law doctrine has likewise been quoted and approved by this court, but in the cases in which this was done it does not appear that the question presented in the case now before us was raised or considered. I do not, therefore, regard the questions as having been directly passed upon and determined in either of those cases, or in any other case decided by this court. The two cases I allude to are *Williams v. The State*, 2 Texas Court of Appeals, 271, and *Powell v. The State*, 13 Texas Court of Appeals, 244.

As I understand the twelfth and thirteenth paragraphs of the charge of the court, which are approved by Judge Hurt, they are a substantial enunciation of the common law upon the subject under consideration. This being the case, the same are correct, unless the common law has been changed by the provisions of our Code. I will now proceed to point out wherein, in my opinion, the common law with reference to this subject has been materially changed, modified and ameliorated by our statute. I will first quote at length the articles of our Penal Code bearing upon the question. They are as follows:

"Article 546. Homicide is the destruction of the life of one

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human being by the act, agency, procurement or culpable omission of another.

"Article 547. The destruction of life must be complete by such act, agency, procurement or omission; but, although the injury which caused death might not under other circumstances have proved fatal, yet if such injury be the cause of death, without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is homicide.

"Article 548. The foregoing article, in what is said of gross neglect or improper treatment, has reference to the acts of some person other than him who inflicts the first injury, as of the physician, nurse or other attendant. If the person inflicting the injury which makes it necessary to call aid in preserving the life of the person injured, shall wilfully fail or neglect to call such aid, he shall be deemed equally guilty as if the injury were one which would inevitably lead to death."

It is to be noticed that there is a difference, though perhaps not a very material one, between the definition given at common law of "homicide," and that given in our Code. Blackstone defines it as "the *killing* any human creature." (4 Black. Com., 177.) Hawkins defines it "the *killing* of a man by a man." (1 Hawk. Pl. Cr., C. 8, sec. 2.) Our Code is more specific, and states it to be the *destruction* of the *life* of one human being, by the *act, agency, procurement or omission* of another. And it goes still further and requires that the *destruction of life must be complete*; not only so, but must be complete *by the act, agency, procurement or omission* aforesaid—that is, it must be complete by the act, etc., of the defendant. I find no such special requirement as this in the common law, though it may perhaps be embraced within the general rules on the subject. I have merely called attention to these differences to show that our Code upon this subject is by no means an exact copy from the common law, but contains some things which are not expressed so fully, if expressed at all, by the common law writers.

I come now to the most material points involved in this contention. What is meant by the words "but although the injury which caused death might not, under other circumstances, have proved fatal," used in Article 547 above quoted? In my judgment they refer to *all* injuries which are not of themselves inevitably fatal, or which are not inflicted under circumstances which make them inevitably fatal. In other words, *all* injuries which under the circumstances of the particular case are not *neces-*

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sarily fatal, but which may cause death. An injury which *must* cause death under any state of circumstances, such as the severance of the head from the body, the severance of the carotid artery, or the breaking of the neck, would not come within the meaning of the words quoted. For injuries of this character no legislation is required, because they cannot be affected either by cure or negligence, skillful or unskillful treatment. They produce death in spite of any human aid. But, if the injury be such that death is not a certain result thereof, if it be such that human aid and skill may prevent its fatal termination, then it is such an injury as the words quoted refer to. I need no better illustration of the idea I am endeavoring to express than the case before us. In this case the wound inflicted upon the deceased by the defendant was a *mortal* wound, but it was not *necessarily* fatal; it would not surely and inevitably produce death; it was within the power of human aid and skill, perchance, to prevent it from terminating fatally. It was, therefore, in the language of the statute, "an injury which might not, under other circumstances, have proved fatal." That is, this injury, if it had been properly treated, skillfully attended to, by those called to treat it, might have been cured and the life of the deceased saved. But if it had nevertheless produced the death, although by proper and timely aid and treatment death might have been prevented, still it would be homicide by the act of the defendant, *unless it should appear that there had been gross neglect or manifestly improper treatment of the person injured* by some other person than the defendant.

In my opinion, just here is the important change made by our statute in the common law. At common law the neglect or improper treatment *must produce the death* in order to relieve the person who inflicted the original injury from the homicide. Such neglect or improper treatment, and not the wound, says Mr. Greenleaf, must appear to be the sole cause of the death. Our statute, as I interpret it, does not require that the neglect or improper treatment should produce the death, either in whole or in part. If there be *gross neglect*, or *manifestly improper treatment*, either in *preventing* or in *aiding* the fatal effects of the injury, the death of the injured person is not homicide by the party who inflicted the original injury. To illustrate: If A should cut B with a knife, severing a small artery, this wound would not be necessarily fatal, yet it would certainly prove so

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unless properly and promptly attended to. The injured party would surely bleed to death in a short time if left without proper aid, but with proper treatment the artery would be closed, the flow of blood thereby stopped, and death prevented. Now, suppose a surgeon is called to treat this wound, and, instead of attempting in any way to stop the flow of blood, he administers to the wounded man chloroform, and leaves him to bleed to death. Here would be gross negligence, manifestly improper treatment of the injured person, and yet the death of such person would be the result solely of the wound, and not of the neglect or improper treatment. At common law this would be homicide. Under our Code, in my opinion, it would not be homicide in A who inflicted the wound, but it would be homicide in the surgeon who permitted the man to bleed to death, when, by the exercise of proper care, and the use of well known and effective means, he could have prevented it. I think "gross neglect and improper treatment," as used in our statute, are not only such as *produce the destruction of life*, but are such, also, as *allow, suffer or permit* such destruction of life.

In this connection, and in support of my construction of these provisions of the Code, I call attention particularly to that portion of Article 548, which provides: "If the person inflicting the injury which makes it necessary to call aid in preserving the life of the person injured shall wilfully fail or neglect to call such aid, he shall be deemed equally guilty as if the injury were one which would *inevitably* lead to death." I find no such provision as this in the common law. What is the object of this provision? Manifestly it is to cause the person who inflicts a personal injury upon another to furnish such aid as may be necessary to prevent a fatal result of such injury. What is the effect of the provision? If the party who inflicted the injury wilfully fails to furnish the aid necessary, and the injured party dies from the injury, the injury is regarded as *inevitably fatal*, and no question as to neglect or improper treatment can arise in the case as a matter of defense. In such case he who inflicted the injury would not be excused of the homicide, even had the death in fact been produced solely by the gross negligence or manifestly improper treatment of those who had the treatment of the case. But, on the other hand, suppose there is no such wilful neglect of the defendant to call aid; suppose he promptly calls a surgeon who has the reputation of being learned and skillful in his profession, and suppose this surgeon grossly neg-

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lects the case, or treats it in a manner manifestly improper, what then is the meaning and effect of this provision? In such case, in my opinion, the homicide is shifted from the defendant to the surgeon, and I cannot read these articles of the Code in any other light. The provision I have last quoted, it seems to me, is inconsistent with the common law rule, but harmonizes with and makes perfect the rule which, I think, is prescribed by the Code.

If, as contended, the author of the Code merely intended, in the three articles quoted, to declare the common law rule upon the subject, he certainly did not do so very clearly or forcibly, and yet among all the great productions there is not perhaps a more perfect work than our Penal Code. I am sure that those articles were intended to, and do, modify the common law rule, and to the extent that I have suggested, and consequently beyond the limits of the charge given to the jury in this case. In this connection I will say that our Supreme Court, in the case of *Brown v. The State*, 38 Texas, 482, in referring to said articles of our Code, said: "Our law undoubtedly changes the rule of the common law, the theory of which was that he who caused the first injury should be held guilty." The subject is not discussed in that opinion, nor are the changes referred to pointed out, and the case is only valuable for the purpose of showing that this is not the first time that the common law rule upon this subject has been challenged, and denied to be the law of this State. I do not wish to be understood as approving the changes in the common law rule which, in my opinion, have been effected by our statute. It is no business of mine whether such changes are wise or impolitic. My duty and my desire is to arrive at an understanding of the case *as it is*, not the law as I might wish it to be.

It is not a consequence of this view of our law that the defendant would escape all punishment for his criminal act. While he might not be guilty of homicide, he might yet be guilty of an assault with intent to murder, and might properly be convicted of such offense under the indictment in this case. (Code Crim. Proc., Art. 714; *Peterson v. The State*, 12 Texas Ct. App., 650; *Stapp v. The State*, 3 Texas Ct. App., 138.)

I think that the learned trial judge should have instructed the jury upon the law of the offense of assault with intent to murder, even under his view of the other law of the case. I presume he did not give such instructions because they were not requested, and for the further reason, perhaps, that he did not think the evidence justified them. I do not regard the evidence

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as so conclusive in its nature, in regard to the cause of the death, as to exclude that issue from the consideration of the jury. It was a part of the defense that it was the gross neglect and the manifestly improper treatment of the surgeons that produced the death, and not the wound inflicted by the defendant. This was one of the issues presented by the defense. The State proved, by a number of physicians and surgeons who had examined the case, that, in their *opinions*, the wound inflicted by the defendant was the sole cause of the death. This evidence, it is true, was *competent* and *sufficient*, but it was *not conclusive*. It might be met, and, perhaps in the estimation of the jury, be wholly overthrown by other evidence in the case. The jury were the judges of the *credibility* of the witnesses, and of the *weight* of the testimony. Some of these *expert* witnesses who gave it as their opinion that the wound inflicted by defendant *alone* caused the death, had themselves inflicted mortal wounds upon the deceased. They had sawed twice into the back portion of the deceased's skull, and had taken out two pieces of the skull bone. These surgical wounds were in a very vital portion of the skull, and where the skull was perfectly sound. All the expert witnesses admit that these wounds were unnecessary, and were perhaps mortal wounds, but that, in their *opinions*, they did not cause the death. It seems to me that this evidence should have been submitted to the jury for their *opinion* in connection with instructions as to the law of assault with intent to murder. Under the charge as given to the jury, they had but one alternative, and that was to convict the defendant of homicide, or acquit him of any offense whatever. The charge of the court did submit to the jury the issue as to the cause of the death. Having done this, it seems to me to follow, as a matter of course, that instructions as to assault with intent to murder should have followed.

I must say, further, that I do not think the charge upon justifiable homicide is entirely correct. It required the defendant to resort to all other means except flight of preventing the threatened injury to himself before taking life, regardless of the imminence of his peril. I think the law upon this subject has been settled otherwise by several decisions of this court. (*Kendall v. The State*, 8 Texas Ct. App., 569; *Foster v. The State*, 11 Texas Ct. App., 105; *King v. The State*, 13 Texas Ct. App., 277.)

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Statement of the case.

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WHITE, PRESIDING JUDGE. I have read with much consideration and great interest the very able opinions of my brethren as to the proper construction to be given the language of Articles 547 and 548 of the Penal Code. My conclusions are that the views expressed by Judge Willson are correct. I am, therefore, constrained to concur in his opinion, however much I may doubt the wisdom or the policy of a statute which, in my humble judgment, properly admits only of such construction. It does occur to me that if the injury which causes the death under the conditions named in the statute would only amount to homicide, without its appearing that there has been any gross neglect or improper treatment of the person injured, that then the converse of this proposition must also follow inevitably, viz: that, if it does appear that there has been any gross neglect or improper treatment of the party injured, by the physician, nurse, or other attendant, it is not homicide in him who inflicts the first injury. Our business is to interpret the law as we find it in the Code. With its policy we have nothing to do.

For the additional reasons stated in Judge Willson's opinion, the judgment should be reversed and the cause remanded.

*Reversed and remanded.*

Opinions delivered June 27, 1884.

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[No. 3240.]

JIM FLETCHER v. THE STATE.

**THEFT—OWNERSHIP—INTENT—EVIDENCE—FACT CASE.**—See the statement of the case for evidence *held* insufficient to sustain a conviction for theft, inasmuch as it fails to establish the ownership of the stolen property when it was taken, as alleged in the indictment; and because it fails to establish that the property was taken with a fraudulent intent to appropriate, etc.

**APPEAL** from the District Court of Johnson. Tried below before the Hon. Jo. Abbott.

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Statement of the case.

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The indictment charged the theft of two horses, the property of H. W. Keiningham, in Johnson county, on the thirtieth day of July, 1883. The trial resulted in the appellant's conviction, and his punishment was affixed at a term of five years in the penitentiary.

H. W. Keiningham was the first witness for the State. He testified that he had long been a resident of Ellis county, Texas. In 1883 the witness owned a black mare and colt. The mare was branded WP on the thigh and JN on the shoulder. She also had an indistinguishable brand on the neck. One of her hind legs was enlarged. She was about fifteen hands high. The colt was branded with a "lazy T"—that is, a T lying horizontally instead of standing perpendicular. About the last of July or the first of August, 1883, the said mare and colt were running at large on the range on Onion creek, near the witness's home in Ellis county. About that time they disappeared, and the witness knew nothing of them until he learned through Captain Plummer that they were in Johnson county. The witness's son bought the mare from Marchbanks, who lived at or near Waxahachie. Onion creek is about one and a half miles distant from witness's house, and Waxahachie creek is about five miles. Witness heard that the defendant had the animals in Johnson county, and wrote him to that effect, and further that he had plenty of proof in both Ellis and Johnson counties to show that he, the defendant, took them from this county. Witness at the same time wrote him that if he had taken the animals through a mistake and would return them, it would be all right; otherwise, that he, witness, would prosecute. The letter exhibited is the letter the witness received from the defendant in reply. In that letter the defendant said that he did not know the witness claimed the mare and colt, and that the animals had run off and he had never recovered them.

Mr. Reynolds testified, for the State, that he lived in the neighborhood of Keiningham, in Ellis county. In July or August, 1883, the defendant rode up to witness's hog pen, having in his possession at the time a black mare and colt, the animals branded as stated by Keiningham. Witness asked the defendant if he had recently traded for the two animals. He replied that he had owned the mare for some time, but that some one had branded his colt, and he would like to find out who it was. Witness told him that it was his understanding that the mare belonged to Mr. Keiningham, and that he knew the brand on the



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Statement of the case.

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colt to be Keiningham's brand, and that if he would see Keiningham he would be able to find out all about it. Defendant made no reply, but rode off in the direction of the big road, the north end of which led to Waxahachie, and the south end by Keiningham's house. Witness did not know which end the defendant took. Witness saw another man some distance off from the hog pen, with two or three horses. The colt had been cut, evidently by a wire fence.

Mr. Morgan testified, for the State, that in June, 1883, the defendant staid all night at his house in Ellis county. Next morning defendant said that he had a mare in the UP brand running on Onion creek, in Ellis county, and showed the witness a bill of sale, which he said was for that brand. Witness could not read much, but thought the bill of sale called for the UP brand on the shoulder. The defendant left witness's house that morning, saying he was going to Onion creek to look for that mare. About noon defendant returned to witness's house and said that he had found the mare but could not drive her, and wanted witness to go with him and help drive her. Witness could not go, and defendant proposed that he would work for witness that evening if witness would aid him next morning. Witness agreed.

Witness went with the defendant next morning, and they found the mare. She had a colt, evidently foaled the night before. It could not travel. The mare was a black animal, about fifteen hands high, branded UP on the thigh and JN on the shoulder. She had an enlarged leg, and wore a piece of rope on her neck. Witness advised the defendant not to take the mare, as he believed she belonged to some one in the neighborhood. Defendant replied that he would come back some time and take her when nobody would know it. He did not take the mare then, but in the latter part of July he and his brother John came to witness's house, remained over night, and left next morning, saying they were going to get the mare on Onion creek. Witness told the defendant that he had learned that the mare belonged to Keiningham. Defendant replied that he had bought the mare, and was going to take her.

Cross-examined, the witness said that he had told some parties in Johnson county what he knew about this case. He had talked to defendant's counsel about the case. He did not tell the counsel that the mare had a rope on her neck when he first saw her in company with defendant, and that he told defendant

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Statement of the case.

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not to take her, as some one might claim her, and that defendant said he would come and get her when no one knew it. When witness had his interview with counsel he was talking—he was swearing now.

Tom Coulter testified, for the State, that he saw the defendant in Cleburne, Johnson county, about the first of August, 1883, in possession of a black mare and colt answering the description of the animals alleged to be stolen, except that the brand on the mare's thigh was UP. The colt had been cut, evidently by a wire fence. The defendant employed the witness to take the animals to his, defendant's, father's.

William Brigman was the first witness for the defense. He testified that he lived near Waxahachie, in Ellis county. In the early part of 1882, the witness sold the defendant all the stock he owned in the UP and WPB brand. Witness and defendant had their first conversation about the sale at Auburn, near the line of Ellis and Johnson counties, in the presence of another man whom witness did not know. The trade was afterward closed by witness and defendant in the county clerk's office, in Waxahachie, in the presence of Mr Hawkins, county clerk, who drew up the bill of sale. There was a full understanding, which was embodied in the bill of sale. Witness then told defendant that the larger number of horses he had sold since he owned the brand had been shipped, but that three or four horses he had sold had not been shipped. Witness, prior to the sale to defendant, sold Mr. Marchbanks, living near Waxahachie, a black mare, fifteen hands high, branded UP on the thigh. This animal had an enlarged leg. Witness did not tell the defendant about the sale of this mare to Marchbanks. Witness bought the stock from Eslinger, and owned it but a short time. This mare and another animal had the UP brand on the thigh; all others that witness ever saw had it on the shoulder. Witness told the defendant that the only animal he had previously sold, and which he knew to be in the range, was a small black pony he had sold to one Jones. Defendant afterward got that horse up for Jones. Witness also told the defendant that he had been told of a UP mare running on Waxahachie creek.

Witness was here handed a paper on which he identified his signature. It was too much worn to disclose its original contents. The bill of sale conveyed to the defendant all of the interest of the witness in and to the stocks of horses branded UP on the shoulder and UPB on the thigh. [In the statement of,

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Statement of the case.

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facts, this last brand is written in some places UPB, and in others WPB.] The bill of sale provided that such of the stock in the brands described as had other brands were not conveyed. This provision was inserted to protect parties who had previously purchased horse stock from the witness. When witness sold a horse before he sold the brand to the defendant, he invariably instructed the purchaser to put on another brand.

Jim Mathews testified, for the defendant, that he was present at Auburn when the defendant and Brigman made the preliminary trade for the UP brand of horses. He was not present when the bill of sale was executed. Defendant has since claimed the UP brand.

W. C. Banks testified, for the defense, that, in the spring or summer of 1882, the defendant told him that he had purchased the UP and UPB brand of horses from Brigman, and asked witness to sign his note to Brigman for a balance of twenty-five dollars purchase money. Witness signed the note as surety. Defendant subsequently paid the note.

Mr. Prewitt testified, for the defense, that, in October or November, 1882, the defendant told him that he had bought the UP brand of horses. Witness told him that he had seen a black mare in that brand on Onion creek. Defendant told witness he would give witness five dollars to get her up. He afterward wrote the witness that he had found the mare, and would get her himself.

Mark Fletcher, defendant's brother, testified that defendant owned the UP stock of horses running in Johnson county. The brand is not located on any particular part of the body, being in some instances on the left and in others on the right shoulder, and again on one or the other thigh. The figures 77 appear on the neck of these horses.

Mr. Meadows, senior, testified that he established the UP horse brand about nine years before this trial. He sold the brand to his son, who took the stock to Comanche county. The brand was not confined to any particular part of the body, but was put on either shoulder or thigh, whichever chanced to be most convenient at the time of branding. Defendant never asked witness about the brand, but witness had told his brother, John Fletcher, that the brand was not confined to either shoulder or thigh.

Mr. Meadows, junior, corroborated his father in detail, and stated, in addition, that when he purchased the stock of his

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Opinion of the court.

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father he put the 77 brand on the neck. When he brought the stock back from Comanche county, he sold the brand and stock to Mr. Eslinger.

The defense then introduced in evidence the following letter, identified by the witness Keiningham:

“CLEBURNE, Nov'r 7, 1883.

“*Mr. Keiningham:*

“SIR: I received your letter to-day in regard to the old black mare. I got the mare, but did not get her through any mistake. I had been told where the mare was by different parties, but did not know that anybody claimed her. I bought the stock of horses from W. P. Brigman, at Waxahachie, about two years ago, and you can see record of sale in B. F. Hawkins's office, C. C. Ellis county. As ever,

“JIM FLETCHER.

“P. S.—The mare has been gone two months. If she comes back, let me know.”

The defense then introduced a bill of sale signed by W. P. Brigman and acknowledged before the county clerk. That part showing the brand and description of the stock conveyed, and that part containing the reservation alluded to by witness Brigman, were torn out.

Errors in the charge, in refusing requested charges, in refusing an application for continuance, and the insufficiency of the evidence, were the questions raised by the motion for new trial.

*Poindexter & Padelford*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WILLSON, JUDGE. In our opinion this conviction is not sustained by the evidence. It is not shown beyond a reasonable doubt that the mare and colt were the property of H. W. Keiningham at the time the same were taken by defendant. Keiningham testified that he owned a mare and colt, which his son purchased from one Marchbanks, and this mare and colt were shown by other testimony to be the same that were taken by defendant, although Keiningham described the brand upon the mare incorrectly. But Keiningham did not state when he was the owner of said mare and colt, whether at the time of or sub-

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Syllabus.

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sequent to the alleged taking of her by the defendant, or whether *before or after* the presentment of this indictment. If he was not the owner of the mare and colt at the time they were taken by the defendant, as alleged in the indictment, this conviction could not be sustained, because there would be a material and fatal variance between the allegation and the proof. It was essential, therefore, for the State to prove the ownership as alleged, and that such ownership existed at the time of the taking of the property. This proof, in our opinion, the State failed to make,

Again: The evidence fails to establish beyond a reasonable doubt the most essential element of this offense, that is, a *fraudulent intent* on the part of the defendant in taking the animals. There are some slight circumstances tending to show such intent, but on the other hand the decided preponderance of the testimony is, we think, the other way, and supports the defense that defendant took the property in good faith, under an honest belief that it belonged to him.

There are no questions of law presented by the record that need be discussed. Because the verdict is not supported by the evidence the judgment is reversed and the cause is remanded.

*Reversed and remanded.*

Opinion delivered June 27, 1884.

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[No. 2992.]

JAMES GILLESPIE v. THE STATE.

1. SUBSTITUTION OF LOST PAPERS IN CRIMINAL CASES—NOTICE.—If the trial court in criminal cases has any power to substitute lost papers, other than the indictment or information, that power is derived either from Article 1475 of the Revised Statutes, or the inherent authority of the court to supply its own records when lost or destroyed. When supplied under the provisions of the statute, three days notice to the adverse party is expressly required; and when supplied under the inherent power of the court reasonable notice is required upon general principles. See the opinion *in extenso* on the question.
2. SAME—CASE APPROVED—QUÆRE whether an indictment can be substituted before trial. *Schultz v. The State*, 15 Texas Court of Appeals, 258, referred to on this question.

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Opinion of the court.

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APPEAL from the County Court of Coleman. Tried below before the Hon. W. O. Read, County Judg.

The conviction in this case was for gaming, and the penalty imposed was a fine of ten dollars.

The opinion sufficiently discloses the case.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

WILLSON, JUDGE. The indictment and other papers in this cause having been stolen or lost before the trial, the district attorney suggested the facts to the court in a written motion, and asked leave to substitute said papers. This leave was granted, the substituted papers filed, and an order of the court was made and entered declaring the substitution. There appears to have been no notice given the defendant of these proceedings. He excepted to the substituted papers upon various grounds, and among others that he had no notice of the proceedings. These exceptions were overruled.

Our Code of Criminal Procedure makes no provision for the substitution of any papers in a cause except the indictment or information, and in providing the mode of substituting these papers it does not expressly require that the defendant shall have notice of the proceeding. (Code Crim. Proc., Art. 434.) It may well be questioned, however, whether the substitution without notice would be valid when excepted to. We will not now determine this question, as it is not necessary to a disposition of this case, and as we have not had the opportunity of thoroughly considering it.

In this case other papers than the indictment were substituted, and these papers were essential to the case. The substitution of these papers other than the indictment could only have been made under authority of Article 1475 of the Revised Statutes, or in the exercise of the inherent power of the court to supply its own records when lost or destroyed. (*Shultz v. The State*, 15 Texas Ct. App., 258.) If made under the article of the statute above cited, then three days notice of the proceeding to the adverse party or his attorney is expressly required. If made in the exercise of the inherent power of the court, independently of any statutory provision, then, upon general principles, we

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Statement of the case.

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think reasonable notice of the proceeding to the defendant would be required. We are of the opinion that the substitution of the papers other than the indictment was irregular and invalid for the want of notice thereof to the defendant; and for this error the judgment must be reversed and the cause remanded.

The questions raised as to the substitution of the indictment are of too grave a character to be hastily considered or decided. We have not had the time or the opportunity to examine those questions to the extent that would justify us in passing upon them at this time. In the case of *Shultz v. The State, supra*, we suggested a doubt as to whether or not an indictment could be substituted at all *before* trial. We still entertain that doubt. In this case we suggest to the attorney representing the State that he can avoid these questions very easily by having a new indictment preferred by the grand jury, or by presenting an information, the alleged offense being a misdemeanor and not yet barred by limitation.

*Reversed and remanded.*

Opinion delivered June 27, 1884.

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[No. 3210.]

HORACE TREADWELL v. THE STATE.

BURGLARY—INDICTMENT for burglary, to be sufficient, must describe, with all of its statutory ingredients, the felony or theft intended to be committed. In charging the entry with intent to take the property therein being, the indictment in this case was insufficient, because it failed to charge that such intended theft was "without the consent of the owner," an element of theft necessary to be alleged and proved in order to support a conviction.

APPEAL from the District Court of San Jacinto. Tried below before the Hon. E. Hobby.

The conviction in this case was for the burglary of the house of A. R. Day, with the intent to commit theft, and the penalty imposed was a term of two years in the penitentiary.

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Opinion of the court.

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In connection with other questions raised on appeal, besides the validity of the indictment, this court, at a previous day of the term, considered the sufficiency of the evidence to support the conviction. The judgment was affirmed without a written opinion. The opinion which follows was rendered on a motion for rehearing.

*Walton, Hill & Walton*, for the motion.

*J. H. Burts*, Assistant Attorney General, *contra*.

**WILLSON, JUDGE.** In affirming the judgment in this case we overlooked a fatal defect in the indictment. It fails to allege that the entry of the house was with the intent to take the property therein being *without the consent of the owner of said property*. In other words, in charging the intended theft, the essential allegation "without the consent of the owner" is omitted.

It is well settled that in an indictment for burglary "the particular felony or theft intended to be committed must be described with all its statutory ingredients." (*Webster v. The State*, 9 Texas Ct. App., 75; *Rodrigues v. The State*, 12 Texas Ct. App., 552; *Reed v. The State*, 14 Texas Ct. App., 662.) One of the statutory ingredients of theft is that the property must be taken "without the consent" of the owner thereof, and this want of consent must be alleged and proved in order to sustain a conviction for the offense. (Penal Code, Art. 724; *Williams v. The State*, 12 Texas Ct. App., 394.)

Because of this fatal defect in the indictment, the motion for rehearing is granted, the judgment of affirmance is set aside, and the judgment of conviction is reversed and the prosecution is dismissed.

*Ordered accordingly.*

Opinion delivered June 27, 1884.



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Opinion of the court.

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[No. 3232.]

## MARTIN SHUBERT v. THE STATE.

1. OBSTRUCTION OF PUBLIC ROAD—EVIDENCE.—Even in cases where the obstruction is placed upon the road proper, the evidence must show that the obstruction was wilful. *A fortiori*, when the obstruction is consequential—arises from an act which the accused had the legal right to do—the evidence must show that the act was wilfully done, and with a view to such indirect or consequential effects. See the opinion for a case in illustration.
2. INTERPRETATION OF A TERM.—When used in a penal statute, the term “wilful” means with evil intent, or legal malice, or without reasonable ground for believing the act to be lawful.

APPEAL from the County Court of Hays. Tried below before the Hon. E. R. Kone, County Judge.

The opinion discloses the nature of the case. The punishment imposed was a fine of twenty-five dollars.

*Hutchison & Franklin*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. The road alleged to have been obstructed was a public road, crossing the Blanco river at a ford on defendant's land. Some distance, several hundred yards, below the ford, defendant erected a dam across said river on his own land, for the purpose of operating machinery to irrigate his garden. By the erection of this dam the water was raised or backed up at the ford so as to somewhat interfere with and impede the travel across the river.

It will be noted that the obstruction complained of is not one placed directly in or across the road. It was one entirely consequential upon another act of defendant, which in itself was legal; and in its purposes legitimate, in the use of his own property. Our statute in all cases makes the criminality of this particular offense of obstructing or injuring a public road to depend upon the fact that the act constituting the offense was “wilfully” done. (Penal Code, Art. 405; *Brinkoeter v. The State*, 14 Texas Ct. App., 67.)

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Syllabus.

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If necessary that the act should be shown to have been "wilfully" committed, even in cases of direct obstruction—as where the obstruction is placed by the defendant directly across or in the road—*a fortiori* where the obstruction is consequential or indirect, and is occasioned by an act in itself legal, the State should establish beyond all question that the act was *wilfully* done, and with a view to such indirect or consequential effects. (*Prine v. The State*, 36 Ala., 244.)

The word "wilfully" is the word used in the statute to characterize the offense. "When used in a penal statute, the word 'wilful' means more than it does in common parlance. It means with *evil intent* or legal malice, or without reasonable ground for believing the act to be lawful." (*Thomas v. The State*, 13 Texas Ct. App., 200.)

The evidence fails to show that the acts complained of, and upon which this conviction is based, were "wilfully" done. The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 27, 1884.

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[No. 3037.]

WILLIAM WATKINS ET AL. v. THE STATE.

1. SCIRE FACIAS—BAIL BOND—VARIANCE.—Appearance bond recited that the principal cognizor was committed on a charge of theft of property over the value of twenty dollars. The condition in the bond described the offense merely as "theft." *Held*, not to be a variance, and sufficient to state an offense against the laws of this State.
2. SAME—JUDGMENT NISI.—JUDGMENT FINAL upon a forfeited bail bond can be valid only when predicated upon a valid judgment *nisi*, which, to be valid, must state that it will be made final unless good cause be shown at the next term of the court why the defendant did not appear.
3. SAME—PRACTICE IN THIS COURT.—Final judgment based upon an invalid judgment *nisi* is fundamentally erroneous, and will be set aside by this court, whether or not the insufficiency of the judgment *nisi* is assigned as error.

APPEAL from the District Court of Guadalupe. Tried below before the Hon. E. Lewis.

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Opinion of the court.

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This appeal is from a final judgment on the forfeiture of the bail bond of William Watkins, bailed under a *mittimus* charging him with theft of property over twenty dollars in value. Five hundred dollars was the amount of the bond and judgment.

*Burgess & Neal*, for the appellant.

*J. D. Templeton*, Attorney General, for the State.

WHITE, PRESIDING JUDGE. Objections urged to the sufficiency of the appearance bond are not maintainable. The recitals of the bond show that appellant was committed by the examining court upon a charge of "theft of property of value of over twenty dollars;" the conditions in the bond named the offense simply as "theft." There was no inconsistency or variance between the recitals and the condition, and the condition certainly named an offense against the law, and sufficiently so to apprise the defendant of what he was called upon and expected to appear and answer to.

A judgment final upon a forfeited bond can only be valid when predicated upon a valid judgment *nisi*. The judgment *nisi* is the judicial declaration of the forfeiture of the bond. The statute prescribes not only the mode and manner, but provides the very terms or words in which this declaration must be made. (Code Crim. Proc., Art. 441.) "The statute uses the words 'which judgment *shall* state,' etc., showing that the statement is essential and that the requirement is mandatory." (*Collins v. The State*, 12 Texas Ct. App., 356.) Judgment *nisi* must state that the same will be made final unless good cause be shown at the next term of the court why the defendant did not appear. (Id; *McWhorter v. The State*, 14 Texas Ct. App., 239; *Addison v. The State*, Id., 568.)

This objection to the judgment *nisi* was not made by appellants in their assignment of errors preparatory to this appeal. Is it fundamental error which will be considered on appeal when it has not been assigned as error? We are of opinion that it is. There can be no good, valid or binding judgment final unless there has first been a valid judgment *nisi*. A final judgment upon a fatally defective judgment *nisi*, which is the foundation for the former, is entitled to no more consideration than one rendered without any judgment *nisi* at all. In the one as in the other case the judgment final would be void, and a

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Opinion of the court.

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party can avail himself of the invalidity or nullity of the judgment *nisi* in any proceeding where it is sought to establish final liability or to hold him liable on account of such void judgment.

Because the judgment *nisi* upon which the final judgment in this case is based is fatally defective and invalid, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 27, 1884.

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[No. 2896.]

G. B. PICKETT ET AL. v. THE STATE.

1. **SCIRE FACIAS—BAIL BOND.**—That a bail bond binds the obligors for the appearance of the principal from day to day and term to term of the court, until discharged, is not a condition more onerous than that imposed by law.
2. **SAME.—SURETY.**—The suretyship of a married woman invalidates a bail bond only as to her, not as to the principal and other sureties.
2. **SAME.—JUDGMENT NISI** is fatally defective if it fails to state that the same will be made final unless good cause be shown at the next term of the court why the defendant did not appear.

ERROR from the District Court of Jack. Tried below before the Hon. A. J. Hood.

The writ of error in this case is prosecuted from judgment final upon the forfeiture of the bond of Thomas Pickett, bailed in the sum of one thousand dollars on the charge of cattle theft.

*Sparkman & Crane*, for the plaintiffs in error.

*J. H. Burts*, Assistant Attorney General, for the State.

**WILLSON, JUDGE.** We think the bail bond is a valid one. That it binds the obligors for the appearance of the principal from day to day and term to term of the court, until he is discharged by the court, does not make it more onerous than the law makes it. Such would be the legal effect of the bond, even if it was not

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Statement of the case.

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so expressed therein. (Code Crim. Proc., Art. 290). This bond is not conditioned like the one in the case of *Turner v. The State*, 14 Texas Court of Appeals, 168, cited by counsel for appellants. In that case the bond contained a condition which was more onerous than the law required, or than was embraced within the legal effect of a bail bond. That a married woman was a surety upon the bond does not invalidate it as to the other obligors. It would be invalid as to her (Code Crim. Proc., Art. 291), but binding upon the principal and other sureties. (Code Crim. Proc., Art. 452). None of the objections made to the bail bond in this case are, in our opinion, maintainable.

There is a fatal defect in the judgment *nisi*. It does not state that the same will be made final unless good cause be shown at the next term of the court why the defendant did not appear. (Code Crim. Proc., Art. 441; *Collins v. The State*, 12 Texas Ct. App., 356; *Thomas v. The State*, Id., 416, 417; *Barton v. The State*, Id., 613).

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 27, 1884.

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[No. 3176.]

GUS. RUTHERFORD v. THE STATE.

1. MANSLAUGHTER—CHARGE OF THE COURT—PRACTICE.—When the evidence adduced on a trial for murder tends to raise the issue of manslaughter, it is the duty of the trial judge to charge the law of that offense, regardless of his own opinion as to whether or not such evidence will justify a conviction for manslaughter.
2. SAME.—HABEAS CORPUS is available to a defendant whose constitutional right to a trial in due course of law is withheld from him an unreasonable length of time.

APPEAL from the Criminal District Court of Harris. Tried below before the Hon. Gustave Cook.

This is a second appeal from a conviction of murder in the second degree upon an indictment which charged the murder of John Williams *alias* John Wilson, in Harris county, Texas, on

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Opinion of the court.

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the fifth day of August, 1883. The penalty imposed was a term of five years in the penitentiary. The evidence upon which the conviction is had is substantially the same as that adduced on the former trial, and will be found reported at length on page 236 of the fifteenth volume of these Reports.

*P. K. Ewing*, for the appellant.

*J. H. Burts*, Assistant Attorney General, for the State.

WILLSON, JUDGE. This case was once before considered by this court on appeal, and the judgment of conviction was reversed, and the cause remanded for a new trial. It was reversed and remanded because, in the opinion of this court, the trial judge erred in failing to charge the jury the law of manslaughter. We gave our views of the case fully in the opinion of the court delivered at that time, and we shall not reiterate them here. On this appeal we find that the evidence before us is substantially the same as on the former appeal, and the trial judge again failed to charge the law of manslaughter, although specially requested by the defendant so to do.

In refusing the special charge asked, the judge states his reasons for so doing as follows: "This charge is refused, it being the opinion of the court that the reason given in the opinion of the Court of Appeals for its reversal is based upon a statement of evidence which, if believed by the jury to be true, entitled the defendant to an acquittal, and they were so instructed by this court. Such a state of case is so manifestly self-defense that I cannot believe the Court of Appeals intended to say that it would justify a verdict of manslaughter. Therefore, with the highest respect for the Court of Appeals, under my sense of duty, the law and my conscience, I refuse to give this charge."

This court was not, we think, mistaken in the facts of the case as presented to us in the record. We have again closely examined those facts on this appeal, and we still think that a charge upon the law of manslaughter is demanded by the evidence. We have never held, as the learned judge seems to think we have, that the evidence would justify a verdict for manslaughter. It was not and is not our province to determine that question when considering the law of the case, nor was, or is it, the province of the trial judge to determine that question when instructing the jury. That was a question exclusively

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Opinion of the court.

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for the jury to decide. His idea seems to be that if the evidence, *in his opinion*, would not justify a verdict of manslaughter, then he ought not to charge the law of that offense. Such is not the rule of the law. If there is evidence in the case tending to raise the issue of manslaughter, it is the duty of the trial judge to charge the law of that offense, regardless of his own opinion as to whether or not such evidence would justify a conviction for said offense. It is the business of the jury and not the court to pass upon the sufficiency of the evidence. Our constitution and laws guarantee a citizen charged with felony the right of trial by jury, and it is made the duty of the jury, and not of the judge, to pass upon the credibility of the witnesses and determine the weight of the testimony.

It is made the duty of the judge to instruct the jury in the law of the case, correctly and fully, as applicable to the evidence, and to every phase of the case as presented by the evidence. When the judge assumes the power of determining the sufficiency of the evidence to support an issue presented by it, and refuses to charge the law relating to that issue, he invades the exclusive province of the jury, and denies to the citizen on trial the full benefit of the trial by jury, and thus deprives him of a trial by due course of the law of the land.

Our views of this case having undergone no change since our former opinion, we must say that, with the highest respect for the learned trial judge, *under our sense of duty, the law and our consciences, we refuse to let this conviction stand*, and we reverse the judgment, and again remand the cause for a new trial in accordance with what we believe to be the law of the case.

If this defendant cannot have a trial by due course of the law of the land; if this constitutional right is withheld from him for an unreasonable length of time, the remedy by *habeas corpus* is within his reach.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 27, 1884.

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Statement of the case.

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[No. 3238.]

## SHORTY LIVINGSTON v. THE STATE.

**EMBEZZLEMENT—OWNERSHIP—EVIDENCE—FACT CASE.**—See the statement of the case for evidence held insufficient to support a conviction for embezzlement, inasmuch as it does not establish the allegation of ownership.

- **APPEAL** from the District Court of Johnson. Tried below before the Hon. Jo. Abbott.

The conviction in this case was for the embezzlement of a finger ring, of the value of seventy-five dollars, the property of Doc. Martin, in Johnson county, Texas, on the twenty-eighth day of November, 1883.

J. H. Keith was the first witness introduced by the State. He testified, in substance, that he knew the defendant, whom he pointed out in court. In the latter part of the month of November, 1883, as well as the witness could remember, the defendant got up a raffle for a ring which he, defendant, held in his possession, but which the witness understood belonged to Mr. Seyfreidt. The ring was valued at seventy-five dollars. The defendant had a list of the names of the parties who took chances in the raffle, and opposite each name on the list was the number of the chance taken. The witness could not remember the number of the chances sold, but was of impression that they numbered thirty or forty, or more. The witness and Frank Hoffman were the judges of the raffle. It was made the duty of the judges to decide which of the numbers taken won the ring, and it was provided that the property, or the title to the ring, with its possession, should pass immediately upon the rendition of the decision. The ring was raffled in this manner: A circular piece of paste board was numbered with figures to correspond with the figures on the list. It was placed against a wall and fired at by a man agreed upon with a shot gun. It was agreed that the number nearest hit by a shot should win the ring. The gun being fired, the two numbers thirteen and seventeen were so near equidistant from shot punctures that the judges were unable to decide between them until they procured an instrument and measured them, and decided in favor of number thirteen. On the same



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Statement of the case.

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evening, and about an hour after the decision was rendered, the witness went to the defendant and asked him for the raffle list. Defendant told the witness that the list was at his house, but, being told that it was wanted, he said that he would bring it next morning. Witness told him that would not do—that he wanted it then. The defendant then said that he would go to his house and get it. Witness went with him to his house. Arrived at the house, the defendant said that his wife, to whom he had given it, was not at home. Witness then took a seat on the gallery, while defendant went off in search of his wife. Defendant found her about one hundred yards distant from his house, and the two came up to the house together, talking. The witness could not hear, but could see them talking. The three went into the house together.

After each had taken a seat, the defendant asked his wife for the paper with the names and numbers on it that had been put in the machine drawer. His wife said that she had thrown it into the fire, thinking it was of no value. On the way back to town, the witness told the defendant that he was satisfied that some rascality was being practiced about the ring. The defendant replied that number thirteen belonged to his wife; that she had a dream book, and that before the raffle she dreamed that number thirteen was going to win, and that he, defendant, and Mr. Seyfreidt took number thirteen between them; that, after that chance was taken by him and Seyfreidt, his wife got him to go and see Seyfreidt and ask him to surrender number thirteen to her, and that Seyfreidt did so. Witness took the defendant to Seyfreidt, who denied that he had ever had an interest in number thirteen. Witness heard no more of defendant's wife's claim to number thirteen, but afterward heard the defendant claim that number for himself. Martin also claimed number thirteen. Defendant left soon after the raffle, and returned in the custody of the sheriff. This took place in Johnson county, Texas.

Frank Huffman testified, for the State, that he and Keith were the judges of the raffle. The numbers thirteen and seventeen came so near a tie that he and Keith declined to decide without the use of an instrument. While the question of which number had won was being discussed on the field, some one proposed that the list of subscribers to chances should be brought, so that it might be ascertained who owned the contesting numbers. Witness protested against this, saying that he did not want to

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Statement of the case.

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know who the parties were until his decision was rendered. About this time, the defendant approached, looked over the witness's shoulder at the target, and whispered: "It is closest to number thirteen." Witness then took the target to one side, to get the sunlight on it, and the defendant again approached him and said in an undertone: "Number thirteen is mine." This was before the decision was given in favor of number thirteen. The witness afterward saw the list at the Paragon saloon. The witness then saw the defendant's name written in a place from which another name had evidently been erased.

Bob Stanley testified, for the State, that he remembered when the defendant was getting up the raffle. He, defendant, went to Doc Martin, and Martin agreed to take a chance in the ring. Martin kept a restaurant, and it was agreed between Martin and defendant that Martin's subscription price should go against a bill owed by defendant to Martin for meals.

Cal. Stanley testified, for the State, that he was present in the Pearl saloon on one occasion when defendant was trying to get up the raffle for the ring. Martin and defendant first discussed the raffle near the bar. This conversation witness did not hear. Afterward, while Martin was standing near the bar, and defendant in the back part of the saloon near the piano, Martin called out to defendant: "I will take number thirteen." Defendant, who had a paper in his hand, replied: "All right." Defendant wrote nothing on the paper at that time, but passed out of the saloon.

G. Allen was the next witness for the State. He testified that just after the raffle was over, the defendant came to his place of business asking about some oysters. Witness asked him how the raffle had passed off. Defendant said that thirteen was the winning number; that the party who subscribed for that number had not paid, and that he would take it. Defendant then rubbed something from a paper and wrote something on it. The State closed.

George Brown was the first witness who testified for the defense. Witness was a member of the firm of Brown & Wilson, hardware dealers. He had two chances in the raffle for the ring. After the shooting the defendant and the two judges, Messrs. Keith and Huffman, came into witness's store and asked for an instrument with which to measure the two contesting numbers. Witness then looked at the target and told the parties he thought that number thirteen had won. He then asked

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Statement of the case.

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the defendant to let him see the list of names. Defendant handed him the list without hesitation. The list contained some seventy-five names. One of the contesting numbers, with the subscriber's name, was lined out. It is a rule of raffle that when a subscriber has paid his subscription his number is marked "paid." Unpaid subscriptions are not marked at all. It is another rule of raffle that all numbers subscribed for and not paid when the raffle takes place, revert to the person who gets up the raffle or to the person who owns the property raffled for. The winning number in this instance, which was erased, was not marked paid. Other numbers not marked paid were also scratched or lined out on the paper when the witness saw it. Witness did not remember the name written to the winning number and scratched out.

Walter Christian testified, for the defense, that he owned number seventeen, the number in contest for the ring. He paid his subscription, but did not know whether or not his subscription on the list was marked paid. Defendant got up the raffle and had the ring when he got it up.

William Hodges testified that, on the morning after the raffle, the defendant came to him and told him that the raffle had occasioned much dissatisfaction; that, the witness being an old man, he, defendant, wanted the witness's advice; that he wanted nothing but what was fair; that he had won the ring, but was willing to give everybody another chance. Witness told him that his course was simple; that if he won the ring fairly, keep it; if he did not, give it to the man who did fairly win it. Defendant then said that by such a test he could only keep the ring. Defendant left on the train that night. Witness at that time was mayor of Cleburne.

John L. Maxey testified, for the defense, that he had a chance in the raffle for the ring. Number thirteen won the ring. After the raffle witness heard both Martin and defendant claiming the ring. Martin talked about taking the ring from defendant. Witness proposed to the defendant to give him, witness, the ring, promising to hold it for the party in whose favor the controversy was finally settled. Defendant did so. After the defendant left Cleburne, the witness delivered the ring to Tom Coulter, upon an order signed by Martin. Witness proposed to take and hold the ring subject to adjustment, as a friend to the defendant. He could not say that he and defendant were part-

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ners at that time, but to some extent they were interested in the same business.

Tom J. Coulter testified that he was a deputy sheriff of Johnson county. Witness and sheriff Boyd took Martin under arrest to Dallas, on the evening that defendant left Cleburne, and traveled as far as Fort Worth on the same train with the defendant. Witness bought Martin's interest in the ring for twenty dollars. Witness had no change and told sheriff Boyd to pay Martin five dollars, and agreed to pay Martin's wife the balance. Witness also bought the defendant's interest for twenty-five dollars, five dollars to be paid in cash, and the balance to be applied to the payment of a fine due by defendant. Witness got an order from Martin for the ring, got the ring, and still retains it. Witness had never paid any one any amount on the ring, because when he got home he found Walter Christian setting up a claim to the ring. Witness afterwards received a note from Martin, in which he cancelled the trade. Martin was in arrest when the trade was made. He, Martin, said that he had been robbed; that he was taken from home and allowed no opportunity to get together any money; that he had to have money, and for that reason alone would sell the ring. Witness arrested the defendant in Texarkana. Defendant is a reputed gambler. Witness had never known him to follow any other occupation.

The material part of sheriff Boyd's testimony was that Coulter, *en route* to Dallas in charge of Martin, requested him, witness, to pay Martin five dollars, which witness agreed to do on reaching Dallas. He had no change when he reached Dallas, and did not fulfill his promise. He had never paid either Martin or his wife anything.

No brief for the appellant has reached the Reporters.

*J. H. Burts*, Assistant Attorney General, for the State.

WHITE, PRESIDING JUDGE. We will not state in this opinion the evidence upon which this conviction was had, which will be sufficiently shown in the report of the case. It is not made to appear from the statement of facts that the ring appellant was convicted of embezzling was in fact the property of Martin, the alleged owner. It is, to say the least of it, doubtful if defendant's claim to it was not honestly and legally made. But,

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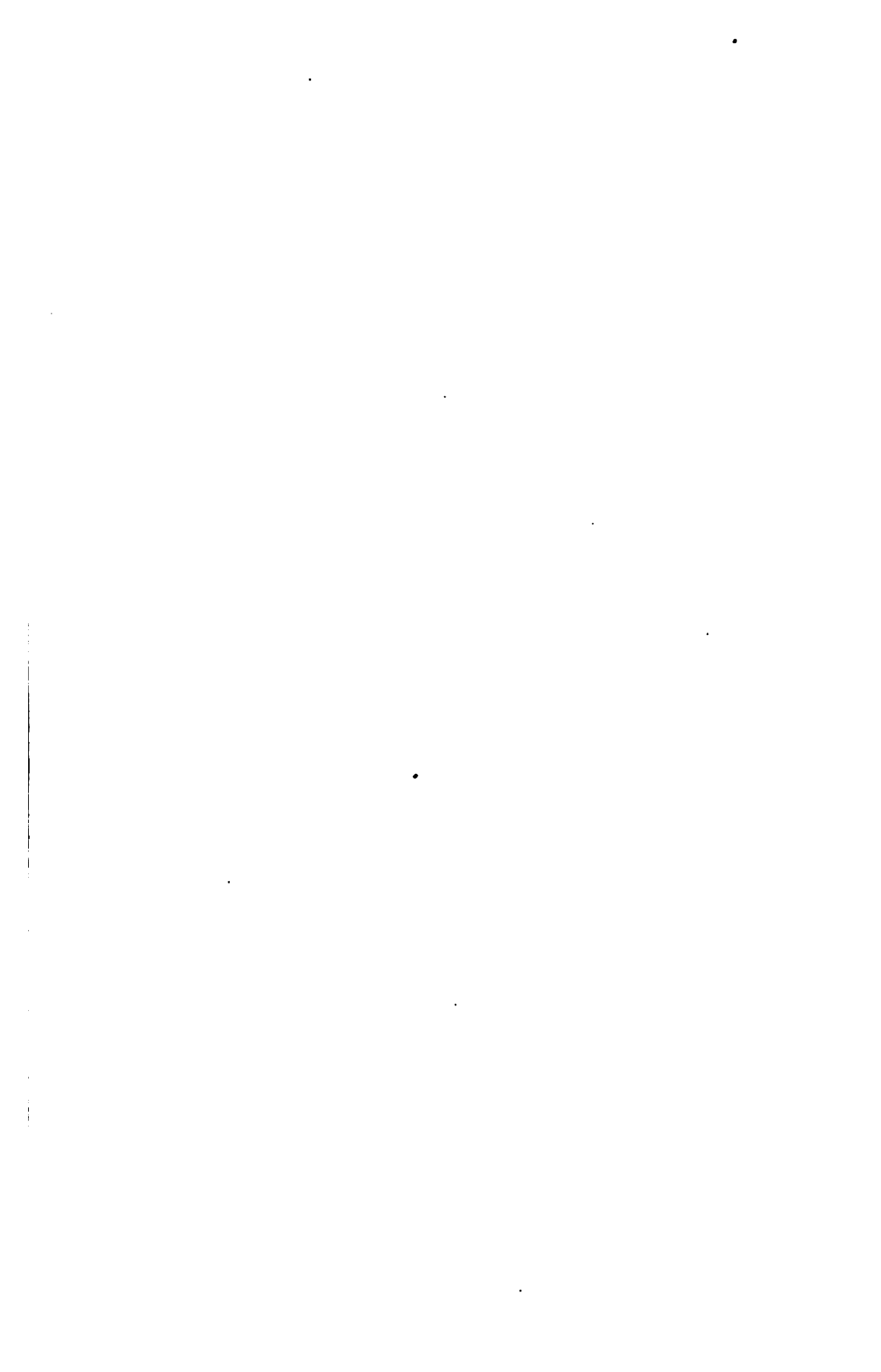
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whether this be so or not, it was incumbent upon the State to prove, as charged, that it was the property of Martin, and this the State has failed to establish with that reasonable degree of certainty that we are enabled to say that this most important fact is evident and made manifest by the record. Unless the property was Martin's, as is alleged, then there can be no doubt but that the entire prosecution must fail.

Because the evidence is insufficient, the judgment is reversed and the cause remanded.

*Reversed and remanded.*

Opinion delivered June 27, 1884.



# INDEX

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## A

### ACCOMPLICE.

Accomplice under our Code is the same as an accessory before the fact at common law. As at common law there could be no accessories before the fact to manslaughter, so under our Code there can be no accomplice to manslaughter. But at common law there might be a principal in the second degree to manslaughter, and under our Code the offense of manslaughter admits of principals. Hence the court erred in charging the jury that "the law of principals does not apply to cases of manslaughter," but the error being in favor of the accused, it is not revisable by this court. *Ogle v. State*, 361.

### ACCOMPLICE TESTIMONY.

1. The State has the right, in a prosecution for cattle theft, to prove that the defendant illegally altered the brands on the cattle. Where, then, it appears that a witness knew that the defendant illegally altered the brands, and with this knowledge and the further knowledge that a third party claimed the cattle through the defendant, he assisted the said third party to drive the said cattle to market, such evidence is sufficient to raise the question of the witness's complicity. Under such a state of facts, the court charged the law of accomplice as follows: "An accomplice is one who, knowing the unlawful intent of another, aids him in the commission of the theft. If the jury find that the witness H. was an accomplice in the theft, provided a theft was committed as charged, then the jury could not convict the defendant on his testimony alone, and unless it be corroborated in some material matter tending to connect the defendant with the theft," etc. This charge was excepted to, in the motion for new trial, upon the ground that the court erred in setting out and defining the law of accomplice testimony, in limiting the question of accompliceship to the connection of the witness with the commission of the theft. *Held*, that the objection was well taken; that the charge should have submitted the question of *particeps criminis* in its full import, whether with regard to the original theft or to any subsequent connection with the stolen property; and that the error is of such character as to operate to the prejudice of the defendant, and is therefore cause for reversal. *House v. State*, 25.

2. When the testimony of a State's witness tends to implicate him as a *particeps criminis*, or an accomplice in the offense, it is the duty of the

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ACCOMPLICE TESTIMONY—*continued*.

court to give in charge the law regulating such evidence, and to refuse a correct charge asked upon the question is fatal error. See the opinion for evidence held to implicate a witness as an accomplice. *Howell v. State*, 98.

3. Accomplice testimony is not of itself sufficient to support a conviction. Such testimony must be supported by corroborating evidence, obtained from other sources, establishing not only the commission of the offense but the connection of the defendant with it. See the statement of the case for the evidence of a witness held to constitute him an accomplice, and for evidence held insufficient to corroborate his testimony. *Zollicoffer v. State*, 312.

4. While in some cases it may be proper enough for the court to assume, under a certain state of facts, that a witness is an accomplice, and so to instruct the jury, the better and safer practice is to submit that question to the jury, in all cases; but in doing so great care should be taken to instruct clearly and fully as to what will constitute an accomplice under Article 741 of the Code of Criminal Procedure. *Id.*

5. Accomplice, as used in Article 741, Code of Criminal Procedure, signifies any person who has participated in the commission of the crime, whether as a principal offender, an accessory, or in any other manner which makes him a *particeps criminis*. In this case the court charged upon the meaning of accomplice as follows: "For the purposes of this case it is sufficient to define an accomplice as one who participated in the commission of an offense as a principal, as before defined." Held, sufficient under the facts in this case. *Id.*

## AFFIDAVIT.

It is only when the proposed absent testimony upon which a motion for new trial is based is claimed to be newly discovered that the affidavit of the absent witness to the effect that he would testify as stated in the motion is necessary to the validity of the motion. In all other respects it is only when the State has taken issue with the defendant on the truth of the matters set forth in the motion for new trial that the trial judge is required or authorized to hear evidence by affidavit or otherwise. The affidavit of the absent witness, in this case, was not essential to the validity of the motion. *Stanley v. State*, 392.

## AGGRAVATED ASSAULT.

1. In every assault there must be an intent to injure coupled with an act which must at least be the beginning of the attempt to injure at once, and not a mere act of preparation for some contemplated injury that may afterwards be inflicted. See evidence held to be insufficient to support a conviction for aggravated assault, because insufficient to prove an assault. *Fondren v. State*, 48.

2. Information charged that the assault was aggravated because made with a deadly weapon, to wit, an ax. The court charged, as requested by the State, that "the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with an intent to alarm an-



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**AGGRAVATED ASSAULT—continued.**

other, and under circumstances calculated to effect that object, comes within the meaning of an assault. When a dangerous weapon is used under the above mentioned circumstances, the ability to effect injury is not necessary." *Held*, error, as not applicable to the assault charged, and as an abandonment of the aggravation alleged in the information. *Anderson v. State*, 132.

**AGGRAVATED ASSAULT AND BATTERY.**

1. The first count in the indictment alleged that the assault and battery was committed by an adult male upon a female. An adult is a person who has attained the full age of twenty-one years. The defendant produced the positive testimony of his father that he was not twenty-one years of age at the time of the trial. The only testimony tending to contradict this evidence was the statement of the prosecutrix, who testified that she thought the defendant was twenty-one years old, but whether this had reference to the time of the offense or that of the trial does not appear, nor did the witness testify that she knew the age of the defendant. *Held*, first, that the evidence was insufficient to support the allegation that the defendant was an adult male; and second, that the mere opinion of the State's witness was not sufficient to confute the positive testimony of the defendant's. *Hall v. State*, 6.

2. The word "decrepit," as used in Article 496 of the Penal Code, has a more comprehensive meaning than that given to it by lexicographers, and a "decrepit person" must be held to be one who is disabled, incapable or incompetent from either physical or mental weakness or defects, whether produced by age or other causes, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength. Decrepitude may exist without the supervention of age. See the opinion for evidence *held* insufficient to support the allegation that the assaulted person was a decrepit person. *Id.*

3. The third count in the indictment alleged that the defendant went into the house of a private family and there committed the assault and battery. The evidence disclosed that the assault occurred in the house of the defendant's father, of whose family the defendant was a member, and of which house he was an occupant. *Held*, that the evidence was insufficient to bring the offense within the meaning of subdivision 3 of Article 496 of the Penal Code, wherefore the court did not err in omitting to instruct the jury upon that count. *Id.*

**ALTERATION.**

In the original bond, sent up for inspection, the name of a surety had been erased by ink lines drawn across it, so as to obliterate it. It was objected, to the competency of the bond as evidence, that it first devolved upon the State to satisfactorily explain the erasure, and show that it was made under circumstances that did not affect the rights of the obligors. *Held*, that the objection was well taken. *Collins v. State*, 274.

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**AMENDMENT.**

1. A trial court has the authority to amend a judgment after the expiration of the term at which it was rendered, in order to correct clerical errors or mistakes, or to add an omitted clause necessary to give it effect, when there is anything in the judgment by which to amend. Under this rule, as laid down in this State and supported by elementary authority, the trial court, in a proceeding on a forfeited appeal bond, was authorized to amend the judgment *nisi* by inserting the omitted words, "the judgment will be made final unless good cause be shown at the next term of the court why the defendant did not appear." *Collins v. State*, 274.

2. Articles 1854 and 1855 of the Revised Statutes require that notice be given to the parties interested in a judgment or decree before any correction of mistakes or misrecitals in the judgment can be made by amendment. Judgment *nisi* is the foundation of *scire facias* proceedings on a forfeited bail bond. To that judgment the principal in the bail bond is a direct party in interest, and, by reason thereof, becomes a necessary party to a proceeding to amend the judgment *nisi*, even though he was not made a party in the *scire facias*. *Id.*

3. Whether or not it is well supported in reason, the rule that suspends all proceedings in the trial court after appeal has been perfected, must be held to prohibit the trial court from amending the record pending appeal, and to the same extent operates to prohibit the substitution of any part of the record after appeal. This rule is not commended by this court, but is upheld on the principle of *stare decisis*. *Turner v. State*, 318.

**APPEAL.**

The appellant was convicted in a justice's court for carrying a pistol, and his punishment was assessed at a fine of twenty-five dollars. His appeal to the county court was there dismissed on the ground that his appeal bond was defective; from which judgment of the county court appeal is prosecuted to this court. A motion is made by the Assistant Attorney General to dismiss this appeal because this court has no jurisdiction of appeals from justices' courts wherein the fine, exclusive of costs, does not exceed one hundred dollars. *Held*, that section 16 of Article 5 of the Constitution, which provides "that in all appeals from justices' courts there shall be a trial *de novo* in the county court, and when the judgment rendered or the fine imposed by the county court shall not exceed one hundred dollars, the trial shall be final," applies only to trials *de novo* on the merits in the county court, and not to such proceedings as were had in this case. In other words, an appeal lies to this court from a judgment of the county court, dismissing an appeal from a justice's court, when the amount of the judgment was for more than twenty dollars; wherefore the motion to dismiss this appeal is overruled. *Taylor v. State*, 514.

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**APPEAL BOND.**

1. In order to bind a party to a written contract, it is not necessary that his signature should appear at the end of it. If he writes his name in any part of the agreement, it may be taken as his signature, provided it was there written for the purpose of giving authenticity to the instrument, and thus operating as a signature. In holding the appeal bond from the justice's court defective because the appellant signed his name in the middle instead of at the end, the county court erred. *Taylor v. State*, 514.

2. The county court erred in dismissing the appeal from the justice's court because it appeared that the bond had not been approved by the justice. The rule is: "The statute requiring the justice to approve the bond taken by him from a party held to appear in the district court, etc., is directory, and the bond is not a nullity because the magistrate neglects to endorse his approval on it. The approval may be inferred from his return of the bond to the district court." *Id.*

**ARREST.**

1. The ordinances of the incorporated town of D. making drunkenness and breaches of the peace offenses, the marshal of the town or his deputy was authorized, without warrant, to arrest a party infringing such ordinances in his view. The fact that the drunken man's proposition when first arrested, to give bond, was refused and he was confined in the calaboose for an hour, will not authorize a conviction for false imprisonment. *Beville v. State*, 70.

2. Upon the question of the right of the deputy marshal to arrest a party detected in the violation of the ordinance, the trial court charged that, in order to make a valid arrest, such officer must have "express" authority. *Held*, error. *Id.*

**ARREST OF JUDGMENT.**

*See* JUDGMENT, 5, 6.

**THEFT, 8.**

Indictment for the offense of robbery which pursues, substantially, the common law precedents for that offense is sufficient. It is not, however, always sufficient to charge an offense in the exact words of the statute defining it, the rule being that the facts constituting the offense must be alleged by direct, positive and certain averments, and not by way of argument or inference. Failing to allege that the party robbed was the party assaulted by the defendant, and put in fear of his life or bodily harm, the indictment, in this case, is insufficient, wherefore the motion in arrest of judgment should have prevailed. *Trimble v. State*, 115.

**ASSAULT WITH INTENT TO MURDER.**

1. Indictment charges the appellant in this case with an assault with intent to murder one A. The charge of the court authorized the jury to convict in case they believed from the evidence that he committed such assault upon either A. or M. *Held*, error, because under no state

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**ASSAULT WITH INTENT TO MURDER—continued.**

of proof could the jury be authorized to convict for an assault on M. under an indictment charging the assault to have been committed upon A. *Brown v. State*, 197.

2. The defense in a trial for assault to murder proposed to prove by a witness that an officer, a short time before the shooting, directed one of the parties shot to take the other party from a saloon to his home because he was intoxicated. *Held*, that such evidence was clearly hearsay and irrelevant, and was properly excluded. *Hobbs v. State*, 517.

3. The defendant was a watchman at a railroad freight depot, and in the night time fired upon and wounded two men passing near the depot. *Held*, that, as tending to throw light upon the question of motive in shooting, and as having a tendency to mitigate, if not to justify, the conduct of the defendant in shooting, he was entitled to prove that there had been a great deal of car breaking and stealing from the cars at the depot where he was on duty as guard. *Id.*

4. The construction placed upon the statutes referred to would not operate to shield a defendant from all punishment for his criminal act, but an indictment for murder, as in this case, if supported by proper and sufficient evidence, would support a conviction for assault with intent to murder. See the statement of the case for evidence *held* to demand a charge upon the law of assault with intent to murder. *Morgan v. State*, 598.

**ASSAULT WITH INTENT TO RAPE.**

1. In order to sustain a conviction for assault with intent to commit rape, the proof must show that the assault was committed with the specific intent to *rape*. No other intent will suffice. For instance, a conviction for such offense is not supported by proof that the accused assaulted a woman with the intent of having improper connection with her, without the use of force, nor without her consent. *Thomas v. State*, 535.

2. See the opinion *in extenso* for a charge of the court which, though couched in the language of the Code, and correct in the abstract, is *held* error, inasmuch as its effect is to impose upon the defendant the burden of proving himself innocent of any unlawful intent to perpetrate any offense. *Id.*

3. See the statement of the case for evidence *held* insufficient to support a verdict for assault to rape, inasmuch as it fails to establish the essential element of intent. *Id.*

**ATTACHMENT FOR WITNESS.**

1. Section 10 of the Bill of Rights guarantees to any one accused of crime compulsory process to procure witnesses in his favor, but this right is regulated by Articles 488 and 489 of the Code of Criminal Procedure. Article 489 of that Code provides as follows: "Where a witness resides out of the county in which the prosecution is pending, the defendant shall be entitled, on application, either in term time or in vacation, to the proper clerk or magistrate, to have an attachment issued to compel the attendance of such witness. Such application shall be in writing

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**ATTACHMENT FOR WITNESS—continued.**

and under oath, shall state the name of the witness and the county of his residence, and that his testimony is material to the defense." It is contended by the State that the effect of the act of April 23, 1883, entitled "An act to provide for the payment of attached witnesses in felony cases," is to so far repeal or modify Article 489 as to commit the matter to the sound discretion of the court when the application is made in term time. *Held*, that the position is untenable; that, tested as it must be by the title, the purpose of the said act of April 23, 1883, was simply to regulate compensation of attached witnesses in felony cases, and it in no way effected the repeal or modification of the Article 489 of the Code of Criminal Procedure. *Roddy v. State*, 503.

2. Applications for attachments for absent witnesses are not subject to judicial discretion, as provided with regard to applications for continuance. The materiality and probable truth of the testimony expected to be secured from the witnesses named in the application for attachment are not to be determined, on the motion for new trial, in the light of the evidence adduced on the trial. *Id.*

**ATTORNEY AND CLIENT.**

See PRIVILEGED COMMUNICATIONS.

## B.

**BAIL.**

See BAIL BOND.

**RECOGNIZANCE.****SCIRE FACIAS.**

1. A peace officer making an arrest for a felony by virtue of the warrant of a magistrate, has no right to take bail, but must take the accused before the proper magistrate named in the writ. The warrant in this case charged a felony, and bail was accepted by the officer who made the arrest. *Held*, that the motion to quash the bail bond should have prevailed. *Short v. State*, 44.

2. See the statement of the case for evidence in a habeas corpus proceeding for bail under a charge of murder, *held* insufficient to authorize the refusal of bail. *Pace, ex parte*, 541.

**BAIL BOND.**

See ALTERATION.

**APPEAL BOND.****PRACTICE, 28.**

**RECOGNIZANCE, 2, 3.**

**SCIRE FACIAS.**

1. One of the requisites of a bail bond is that it shall state the *time*, and *place* when and where the accused binds himself to appear, and the court or magistrate before whom he is to appear. In stating the time, it is sufficient to specify the term of the court; and in stating the place, it is sufficient to specify the name of the court or magistrate, and of the county. *Fentress v. State*, 79.

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**BAIL BOND—continued.**

2. In this case the bail bond was conditioned as follows: "Now if the said Rainey Fentress shall make his personal appearance before the district court of Bexar county to answer to said indictment *instantly*, to be holden in the town of San Antonio, A. D. 1882, there to remain until discharged by the court," etc. *Held*, sufficient, both as to place and time, the term "*instantly*" having a legal signification, and usually meaning within the next twenty-four hours, and when not so meaning, signifying within a reasonable time, under the circumstances of the case with reference to which it is used. See the opinion *in extenso* on the question, and note the distinction between the statute on the subject now in force and that upon which the cases of *Jackson v. The State*, 13 Texas, 218, and *Busby v. The State*, Id., 137, were decided. *Id.*

3. See the statement of the case for a bail bond *held* sufficient to show that an indictment, charging the principal therein with an offense against the laws of the State, was pending in the district court of Bexar county. Note, also, that it is a valid obligation, wherefore the motion to quash the same was properly overruled. *Id.*

4. See the statement of the case for an answer of sureties which the trial court properly held to present no defense to the action, inasmuch as the facts set up do not come within any of the provisions of Article 452 of the Code of Criminal Procedure, which prescribes the only causes which will operate to exonerate the principal and sureties from liability upon the forfeiture taken. *Id.*

5. Bail bond executed before indictment is not vitiated because it fails to name the precise offense of which the principal therein was subsequently indicted. It is sufficient if it name some offense against the laws of the State. *Vivian v. State*, 262.

6. Theft is *eo nomine* an offense against the laws of this State, and it includes the theft of certain animals. The bond in this case, executed before indictment, recited that the accused was charged with the theft of animals. It is urged that, in failing to specify the kind of animals stolen, the bond is not in compliance with the law. But it is *held* sufficient, under subdivision 3 of Article 288 of the Code of Criminal Procedure. *Id.*

7. Bail bond, in stating the place where the accused is bound to appear, is sufficient if it specify the name of the court or magistrate, and of the county. The bond in this case conditions that the accused "shall be and appear before the honorable District Court on the first day of the next term thereof, to be begun and holden at the court house in Carrizo Springs, in said county, on," etc. The bond nowhere recites the name of a county, but recites that the accused has been arrested by virtue of a warrant issued by "J. R. Sweeten, J. P. Pr. No. 1, D. C." *Held*, that this court is not authorized to presume that the initials "D. C." signify "Dimmit County," nor that "Carrizo Springs" are in Dimmit county. In this respect the bond fails to state the name of the county before the district court of which the accused was bound to appear, and for that reason the motion to set aside the judgment *must* should have prevailed. *Id.*

8. Under the Revised Code, the generic term "horse" embraces all animals of the horse kind. The indictment charged the offense of steal-

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BAIL BOND—*continued.*

ing "one horse." The bond described the offense as the theft of "one sorrel mare." *Held*, that the descriptions were not variant. *Collins v. State*, 274.

9. Appearance bond recited that the principal cognizor was committed on a charge of theft of property over the value of twenty dollars. The condition in the bond described the offense merely as "theft." *Held*, not to be a variance, and sufficient to state an offense against the laws of this State. *Watkins v. State*, 646.

10. Judgment final upon a forfeited bail bond can be valid only when predicated upon a valid judgment *nisi*, which, to be valid, must state that it will be made final unless good cause be shown at the next term of the court why the defendant did not appear. *Id.*; *Pickett v. State*, 648.

11. That a bail bond binds the obligors for the appearance of the principal from day to day and term to term of the court, until discharged, is not a condition more onerous than that imposed by law. *Pickett v. State*, 648.

12. The suretyship of a married woman invalidates a bail bond only as to her, not as to the principal and other sureties. *Id.*

## BAILEE.

*See* EMBEZZLEMENT, 5.

## BILL OF EXCEPTIONS.

*See* PRACTICE, 16.

1. Objection that the trial court erred in refusing an application for a continuance must be presented by bill of exception. Otherwise, the question will not be considered by this court. *Spear v. State*, 98.

2. Bill of exceptions, to be entitled to consideration, must have been presented to the trial judge for allowance and signature during the trial term, and within ten days after the conclusion of the trial. A trial is "concluded" by the judgment overruling a motion for new trial, or in the event that no such motion, and no motion in arrest of judgment is made, the conclusion of the trial is when the verdict of the jury has been received. The bill of exceptions in this case is sufficient because approved in term time, and within ten days after the motion for new trial was overruled. *Harrison v. State*, 325.

3. Bill of exceptions reserved to the action of the court in sustaining objections to proposed testimony, which fails to disclose the evidence sought to be elicited, and the grounds urged to it and sustained, is not sufficient to enable this court to determine the relevancy and materiality of the rejected evidence, and hence its exclusion cannot be held error. *Sutton v. State*, 490.

## BURDEN OF PROOF.

*See* FORMER CONVICTION, 3, 4, 5.

JUDICIAL COGNIZANCE, 2.

PRACTICE, 5.

1. Where the State, in a theft case, relies upon the defendant's possession of recently stolen property as an inculpatory fact, the defend-

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**BURDEN OF PROOF—continued.**

ant is entitled to prove his explanation of his possession made at the time his possession was first challenged, and if such explanation be reasonable the *onus* of disproving it is imposed upon the State. In this case the defendant attempted to prove a conversation with a witness for the purpose of getting his explanation before the jury, but was not permitted to do so. But *held*, that, inasmuch as the bill of exceptions reserved to this ruling fails to disclose the conversation or its materiality, this court cannot revise the action of the court below in this matter. *Howell v. State*, 98.

2. The explanation of a defendant when first found in possession of stolen property, if reasonable, imposes upon the State the burden of proving its falsity. *Ross v. State*, 554.

**BURGLARY.**

1. See the evidence *held* insufficient in these cases to sustain convictions for burglary. *Zollicoffer v. State*, 812; *Ross v. State*, 554.

2. It is no objection to an indictment that it charges both burglary and theft, but a conviction cannot be had for both offenses when thus charged in the same indictment, and a separate punishment assessed for each, or a joint punishment assessed for both. The correct doctrine has been thus stated: "If both (burglary and theft) are charged in one indictment, it is clear that the theft would be included in the burglary, and that no judgment could be rendered for the theft; and, in such a case, the conviction for burglary would be a bar to a subsequent prosecution for theft." *Miller v. State*, 417.

3. The indictment charging both burglary and theft, and the verdict being "guilty as charged in the indictment," the defendant stands convicted of both offenses, notwithstanding the presumptive intention of the jury to convict of burglary alone, inasmuch as the punishment assessed is the *minimum* prescribed for that offense. The issue of theft was not submitted by the charge. The court adjudged the defendant guilty of "robbery," and sentenced him for theft and burglary. *Held*, that the verdict cannot stand, inasmuch as it is not warranted by the charge, and because, though it is conformed to by the sentence, it is not by the judgment. *Id.*

4. See the opinion *in extenso* for an indictment for burglary *held* sufficient to charge the offense. *Ross v. State*, 554.

5. In a trial for burglary the trial court charged the jury on the subject of "entry" as follows: "It is not necessary that there should be any actual breaking to constitute the offense of burglary, when the entry is in the night time. An entry into a house in the night time, without the consent of the owner, or some other person authorized to give consent, with intent to commit a theft, is an entry by force, as meant in the law." *Held*, error; that to constitute burglary the entry must be by "force," "threats" or "fraud," whether committed in the day time or night. The definition of *entry* in Article 706 of the Penal Code, which makes it to include, within the meaning of Article 704, every kind of entry but one made with the free consent of the occupant or of one authorized to give



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**BURGLARY—continued.**

such consent, does not eliminate from the offense the element of force, nor dispense with the necessity of alleging and proving an entry by force. But if the entry is at night, the slightest force suffices. *Id.*

6. Indictment for burglary, to be sufficient, must describe with all its statutory ingredients, the felony or theft intended to be committed. In charging the entry with intent to take the property therein being, the indictment in this case was insufficient, because it failed to charge that such intended theft was "without the consent of the owner," an element of theft necessary to be alleged and proved in order to support a conviction. *Treadwell v. State*, 643.

## C

**CASES OVERRULED.**

See CHARGE OF THE COURT, 48.

Insofar as they hold that only such statements as are afterwards found to be true are admissible, excluding the remaining parts of the confession, the following cases are hereby overruled: *Davis v. The State*, 8 Texas Court of Appeals, 510; *Walker v. The State*, 9 Texas Court of Appeals, 38; *Massey v. The State*, 10 Texas Court of Appeals, 645; *Kennon v. The State*, 11 Texas Court of Appeals, 353. *Weller v. State*, 200.

**CHANGE OF VENUE.**

See PRACTICE, 16.

**CHARGE OF THE COURT.**

See EMBEZZLEMENT, 2.

FALSE IMPRISONMENT, 2.

FORMER ACQUITTAL, 3, 4, 5.

PRACTICE, 17.

PRESUMPTION OF INNOCENCE, 1.

1. The third count in the indictment alleged that the defendant went into the house of a private family and there committed the assault and battery. The evidence disclosed that the assault occurred in the house of the defendant's father, of whose family the defendant was a member, and of which house he was an occupant. *Held*, that the evidence was insufficient to bring the offense within the meaning of subdivision 3 of Article 496 of the Penal Code, wherefore the court did not err in omitting to instruct the jury upon that count. *Hall v. State*, 6.

2. Charges of the court are not tested by the strict rules applicable to indictments. All that is required of a charge is that it shall present the law of the case substantially and correctly, in a way that the jury will understand, and not be confused and misled by it. The objection urged to the charge in this case is that it does not instruct the jury that, in order to constitute theft, the taking of the animal must have been fraudulent. The charge, without using the statutory word "fraudulent" as descriptive of the taking, instructs the jury that if the defendant "took the mare with the fraudulent intent to appropriate her," etc. *Held*, sufficient. *Ashlock v. State*, 13.

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CHARGE OF THE COURT—*continued*.

3. Upon the question of reasonable doubt the court charged the jury that if they had a reasonable doubt of the defendant's guilt, arising from the evidence in the case, they should acquit. *Held*, sufficient; and that the reasonable doubt is not required to be charged with reference to every, or any particular phase of the case. *Id*.

4. The defense was that the defendant honestly acquired possession of the alleged stolen animal, having won her at a game of cards from one H. The evidence was to the effect that K., the owner, turned the animal out on November 12. On the fourteenth day of the same month a witness saw said H. in possession of an animal suiting the description of the one stolen. After this the mare in question was seen on her range for a week or more. A defense witness testified that, a day or two before the defendant was found in possession of the animal in D. he saw the defendant win her from H. at a game of cards; that the mare was not then present, but H. said that she was running at large in a certain lane. Upon this state of evidence the court charged the jury: "If you believe from the evidence that the defendant won the mare in controversy from some person who claimed to be the owner of said animal, at a game of cards, and that he believed such person to be the owner, you will find the defendant not guilty, notwithstanding you may believe that such person was not in fact the owner of the mare." The court refused an additional charge to the effect that if defendant acquired possession of the mare in any way from H., who had stolen her, he would not be guilty of theft, though he may have known that H. stole her. *Held*, that the charge as given was sufficient; that though the principle invoked by the special charge is correct in the abstract, its refusal was not error in this case, in view of evidence which disclosed that even if H. had stolen the animal prior to that time, he had abandoned possession of her, and she was again on her range and in the constructive possession of her true owner. The doctrine applicable to this case is that, when subsequently taken from her range by the defendant, that act constituted another and distinct taking, and if such taking was fraudulent it was theft, although authorized by H. *Id*.

5. The State has the right, in a prosecution for cattle theft, to prove that the defendant illegally altered the brands on the cattle. Where, then, it appears that a witness knew that the defendant illegally altered the brands, and with this knowledge and the further knowledge that a third party claimed the cattle through the defendant, he assisted the said third party to drive the said cattle to market, such evidence is sufficient to raise the question of the witness's complicity. Under such a state of facts the court charged the law of accomplice as follows: "An accomplice is one who, knowing the unlawful intent of another, aids him in the commission of the theft. If the jury find that the witness H. was an accomplice in the theft, provided a theft was committed as charged, then the jury could not convict the defendant on his testimony alone, and unless it be corroborated in some material matter tending to connect the defendant with the theft," etc. This charge was excepted to, in the motion for new trial, upon the ground that the court erred in setting out

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**CHARGE OF THE COURT—continued.**

and defining the law of accomplice testimony, in limiting the question of accompliceship to the connection of the witness with the commission of the theft. *Held*, that the objection was well taken; that the charge should have submitted the question of *particeps criminis* in its full import, whether with regard to the original theft or to any subsequent connection with the stolen property; and that the error is of such character as to operate to the prejudice of the defendant, and is therefore cause for reversal. *House v. State*, 25.

6. In previous decisions of this court the doctrine has been advanced that convictions would not be set aside because of errors or omissions in the charge not sought to be corrected by exception or special charge, nor by being made ground of motion for new trial, unless the error was fundamental. Such doctrine, however, is not altogether correct. The true rule in such state of case is this: If there was a material misdirection of law as applicable to the case, or a failure to give in charge to the jury the law which was required by the evidence in the case, and such error or omission was calculated, under all the circumstances of the case, to prejudice the rights of the defendant, this court should, for either cause, reverse the judgment. *Blam v. State*, 84.

7. The application of the rule stated, in all cases wherein it can be invoked, is controlled absolutely by the character of the evidence adduced on the trial. Whether or not it tends sufficiently to the establishment of a defense, or a mitigation of the offense, as to reasonably demand a charge, is a question primarily committed to the sound discretion of the court below, and then to this court on appeal. If its force is deemed very weak, trivial, light, and its application remote, the court should not charge upon it. If, however, it is so pertinent and forcible that it might, in reason, be expected to influence the jury in reaching a verdict, the court should so charge as to furnish them with the appropriate rule of law upon the subject. *Id.*

8. Objection that the court erred in omitting to charge the law of manslaughter was first made in the motion for new trial. The rule under such circumstances is, that this court will not interfere unless such omission appears calculated to result to the prejudice of the defendant. *Escareno v. State*, 85.

9. The Mexican term "cabron," meaning that the person to whom it is applied consents to the prostitution of his wife, was claimed by the defendant to have been applied to him by the deceased, and upon that ground it is urged that, being an insult to his wife, the homicide could not be murder, but manslaughter, and that the omission of the court to so charge the jury was error. It was proved that some one of several parties present used the word "cabron," but it was not proved that it was the deceased who used it. *Held*, that this evidence was insufficient to disclose prejudice to the defendant in the omission to charge the law of manslaughter. Note, also, that the motion for new trial sets up evidence which clearly discloses that the insulting word was not the moving cause of the homicide. *Id.*

10. Where the State has to rely exclusively upon circumstantial evi-

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CHARGE OF THE COURT—*continued*.

dence to secure a conviction, it is incumbent on the trial court to give in charge to the jury the law controlling such evidence. *Howell v. State*, 93.

11. When the testimony of a State's witness tends to implicate him as a *particeps criminis*, or an accomplice in the offense, it is the duty of the court to give in charge the law regulating such evidence, and to refuse a correct charge asked upon the question is fatal error. *Id.*

12. Charge of the court, in a murder trial, instructed the jury as follows: "If you believe from the evidence that a man was killed, yet unless the evidence of his identity as being Nathan Wurmser satisfies you that it was Nathan Wurmser, you will acquit. In determining this identity you will consider the entire evidence, and the attendant circumstances." It is objected that this charge did not confine the jury to the evidence, but authorized them to look beyond it to attendant circumstances. *Held*, that the charge of the court is not to be so construed. *Spear v. State*, 98.

13. Theft of ordinary property is a felony or misdemeanor according to whether the article stolen was worth as much as or more than twenty dollars, or less than that sum, and when that value is an issue to be determined in the trial, so as to ascertain the grade of the offense, it is the duty of the court to charge the jury upon the standard of value; which is the market value of the article if it have such a value, and if not, the amount it would cost to replace it. The requested charge in this case, though not properly embodying the law, was sufficient to call the attention of the trial court to the omission, and the failure to charge upon the standard of value was error. *Martinez v. State*, 122.

14. Property that is lost, equally with other property, may be the subject of theft. To constitute theft of lost property, however, the fraudulent intent, which is the gist of the offense, must exist in the mind of the taker at the time of the taking; and in case of lost property, the time of the taking is the time of the finding of the property. If the fraudulent intent did not exist at the time of the taking, no subsequent fraudulent intent in relation to the property will constitute theft. Note, in the opinion, a summary of evidence which demanded of the trial court a charge embodying the principle announced. Note also a charge formulated by this court as responsive to this issue. *Id.*

15. Information charged that the assault was aggravated because made with a deadly weapon, to wit, an ax. The court charged, as requested by the State, that "the use of any dangerous weapon, or the semblance thereof, in an angry or threatening manner, with an intent to alarm another, and under circumstances calculated to effect that object, comes within the meaning of an assault. When a dangerous weapon is used under the above mentioned circumstances, the ability to effect injury is not necessary." *Held*, error, as not applicable to the assault charged, and as an abandonment of the aggravation alleged in the information. *Anderson v. State*, 132.

16. The trial court charged the jury as follows: "Possession of property recently stolen is evidence against the accused, which, like all other evidence, is to be taken and considered by the jury in connection

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CHARGE OF THE COURT—*continued.*

with other testimony in the case." *Held*, that exception to the charge was well taken, inasmuch as in charging upon this evidence, separate and apart from the other evidence in the case, the court gave to it undue prominence; and particularly was it error to charge positively that such evidence was *against* the defendant. *Bryant v. State*, 144.

17. The true rule on the subject is that "the possession of property recently stolen is merely a fact or circumstance to be considered by the jury in connection with all the other evidence submitted to them, in determining the guilt of the possessor." *Id.*

18. Nor is it always that the possession of recently stolen property is evidence *against* the possessor. It is always admissible evidence in a trial for theft, but it is for the jury and not the judge to say whether it is or is not against the defendant. Moreover, when it is evidence against the defendant, it is not of itself, unaided by other evidence, sufficient to support a conviction; and the court further erred in refusing to so charge, when requested. *Id.*

19. Circumstantial evidence being alone relied upon by the State, the court charged as follows: "In order to convict upon circumstantial evidence, the circumstances must be so connected as to exclude every reasonable hypothesis but the guilt of the defendant." Exception that the charge as given was not full and explicit enough to enable the jury to properly understand and apply the rule governing circumstantial evidence, was well taken, especially when shown that the principal State's witness was intoxicated at the time of the theft. *Id.*

20. With respect to the question involved, the concluding part of the charge of the court instructed the jury, in effect, if the marking and branding of one of the animals was done, perfected and completed by one act and transaction, and, after such completion, the other animal, if it belonged to a different owner, was, by a different act, marked and branded, it would be a different transaction and offense, although the branding and marking may have been done near the same time and place. *Held*, error, in view of the rule announced and the evidence in this case. *Adams v. State*, 162.

21. Upon the same issue, the defendant requested the court to charge the jury as follows: "If you believe, from the evidence in this case, that the animal charged to be illegally marked and branded, in this case, was marked and branded at the same time and place as the animal charged to have been illegally marked and branded in the indictment in case No. 692, on which indictment the defendant has been tried and convicted, so as to make the marking and branding of the two animals one and the same transaction, or part of the same transaction, then, if the jury so believe, they will find the special plea of defendant true." *Held*, that the requested charge embodied the correct rule upon the subject, and its rejection was error. *Id.*

22. Upon the question of intent, the court charged as follows: "The intent to injure the owner is the gist of this offense, but such intent may be presumed from the fact of the killing." Again: "If you find that defendant killed the horse mentioned in the complaint, you may, from that

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**CHARGE OF THE COURT—continued.**

fact, presume that such killing was done with intent to injure the owner, if, from all the facts and circumstances of the case, it is, in your judgment, proper for you to do so." *Held*, correct, in view of the provision in Article 879 of the Revised Penal Code, which has, with reference to this offense, changed and reversed the previous rule on the subject, and authorized the presumption of intent from the perpetration of the act. *Lane v. State*, 172.

23. The rule stated does not preclude this court from revising the charge of the court, in a felony case, when such charge is not warranted by the indictment, and when, under any state of evidence, it would be manifestly erroneous, and may have prejudiced the rights of the accused. *Brown v. State*, 197.

24. Article 746 of the Code of Criminal Procedure provides that "in trials for perjury no person shall be convicted except upon the testimony of two credible witnesses, or of one credible witness, corroborated strongly by other evidence, as to the falsity of the defendant's statement under oath, or upon his own confession in open court." The accused in this case not having confessed his guilt in open court, it was the imperative duty of the trial court to give in charge to the jury the substance of the above provision of the Code. *Gartman v. State*, 215.

25. Circumstantial evidence alone being relied upon by the State to secure a conviction in this case, it was the imperative duty of the court, whether asked or not, to give in charge the law controlling such evidence. *Allen v. State*, 287; *Cooper v. State*, 841.

26. It is a well settled rule of practice that the charge of the court should submit the law affirmatively upon every legitimate phase in which the evidence might be considered by the jury, and upon all the issues raised by the proof. And when there is a doubt as to whether an issue is or is not directly made by the evidence, the better practice is to solve the doubt by charging the law with reference to it. But see a state of proof whereunder, in the absence of a requested charge, the omission of the court to charge the law applicable to the defendant's explanation of his possession of stolen property before it was questioned was not reversible error. *Kenneda v. State*, 258.

27. Omission to charge the law of circumstantial evidence, when the State relies alone upon that character of evidence, is fatal error. *Id.*

28. While in some cases it may be proper enough for the court to assume, under a certain state of facts, that a witness is an accomplice, and so to instruct the jury, the better and safer practice is to submit that question to the jury, in all cases; but in doing so great care should be taken to instruct clearly and fully as to what will constitute an accomplice under Article 741 of the Code of Criminal Procedure. *Zollicoffer v. State*, 812.

29. Accomplice, as used in Article 741, Code of Criminal Procedure, signifies any person who has participated in the commission of the crime, whether as a principal offender, an accessory, or in any other manner which makes him a *particeps criminis*. In this case the court charged upon the meaning of accomplice as follows: "For the purposes of this

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**CHARGE OF THE COURT—continued.**

case it is sufficient to define an accomplice as one who participated in the commission of an offense as a principal, as before defined." *Held*, sufficient under the facts in this case. *Id.*

80. A single sale of intoxicating liquors does not of itself constitute pursuing or following the occupation of a liquor dealer within the purview of Article 110 of the Penal Code, and in charging that it does the trial court erred. *Standford v. State*, 831.

81. In a murder trial, the court, upon request of the State, charged the jury as follows: "Every man has a right to protect his house from invasion and his family from insult, and, in so protecting them, he has a right to use such force as may be necessary to accomplish his end, after verbal remonstrance has failed; and in the use of such force he will not be considered an aggressor or violator of the law." *Held*, that, while correct in the abstract, this charge was error, in view of the evidence on the question; first, because the evidence shows that there was no invasion of the deceased's premises by the defendant and his associates, but that, on the contrary, they entered upon the premises by invitation of the deceased; and, second, because, having so instructed the jury, the court should have further instructed them that if deceased used greater force or more dangerous means than were necessary to effect the expulsion of the parties, he thereby became himself an aggressor, and was no longer entitled to the immunity which the law, up to that time, afforded him in the protection of his castle. *Turner v. State*, 878.

82. At the instance of the State, the court further instructed the jury as follows: "If you believe from the evidence that defendant and Britton Turner and Tom Stanley went to the house of deceased and cursed and swore and raised a disturbance in the yard of deceased, and were bid by deceased to leave, and refused to do so, then deceased had a right to use all necessary force to put them out of the yard, and if they resisted such force, they cannot justify such resistance on the grounds of self-defense." *Held*, correct in principle, but, in view of the evidence, insufficient in that it did not further charge, in substance, that if the deceased used more force than was necessary to expel the parties, and thereby became himself the aggressor, the law accorded to Stanley the right of defense to the extent of protecting himself against the excessive force used. Note the circumstances of this case, wherein it is *held* that if S., the party who inflicted the fatal blow, acted in self-defense, and was justifiable, the defendant would also be guiltless of the homicide. *Id.*

83. The charges recited were special charges given at the instance of the State, but were not excepted to by the defendant on the trial, nor did he ask additional instructions. They were, however, complained of by him in his motion for new trial. This motion also complained of the failure of the court to charge all the law of the case. *Held*, that the special charges, given in such manner, separate and distinct from the main charge and from each other, and without being accompanied by a further explanation of the law of the case, were calculated to mislead the jury, and materially to prejudice the rights of the defendant. *Id.*

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CHARGE OF THE COURT—*continued*.

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84. Where the fact of unlawful killing is established, and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse or justify the act, then the law implies malice, and the offense is murder in the second degree. See the opinion for a charge upon the subject *held* inconsistent with the rule announced, insofar as in explaining implied malice it omits the qualification that where a homicide is committed under "mitigating circumstances" malice is not implied, although the homicide may be neither excusable nor justifiable. Note the suggestion of this court on the subject. *Id.*; *Stanley v. State*, 392.

85. Upon the right of the deceased to repel an intrusion upon his home premises, the court charged the jury "that entering into a quarrel or an angry verbal altercation with the occupant of the home premises, against his consent, in the presence of his wife and children, if he has any, would be improper conduct in the sense here used." *Held*, error, as being a charge upon the weight of evidence. *Stanley v. State*, 392.

86. On the trial, the State proved, amongst other things, that another party, who was charged in a separate indictment with the same offense, told defendant that he would whip defendant if he did not stand up to what he had said; that the appellant did not want to go with the other parties separately indicted for this offense to the house of deceased; that defendant said he feared a difficulty if they went; that defendant *en route* expostulated against going, and that defendant was a man of peaceable disposition. In view of this and other evidence, the defense asked the following charges of the court: "If you believe from the evidence that John and Britton Turner, by threats or otherwise, exercised undue influence over the person of the defendant, sufficient to overcome the mind of an ordinary man, and thereby induced him to accompany them to the residence of the deceased, then he was excusable in being there." "If you believe from the evidence that the defendant was a mere trespasser upon the premises of the deceased, or was brought there by undue influence exercised over his mind by threats or otherwise from John and Britton Turner, sufficient to overcome the will of an ordinary mind, and that defendant used no insulting words or threatening gestures previous to the attack of the deceased, then the deceased was not justifiable in doing him serious bodily injury except in defense of himself and family." *Held*, that whilst the charges asked were not critically correct, nor based upon such facts as would bring the case within the letter of the statute which makes duress a complete defense for acts otherwise punishable, the charges were within the spirit of that statute, and, under the peculiar circumstances of this case, their refusal was error. *Id.*

87. Indictment comprehended the two counts of selling the estray animals without having given legal notice of the sale, and of selling the same when three adult bidders besides the family of the taker up were not present. After the evidence was submitted the State abandoned the first count, and elected to proceed on the second, notwithstanding which the court charged, in effect, that if the jury believed the defendant sold the said animals without having given legal notice, they should convict.



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**CHARGE OF THE COURT—continued.**

*Held*, that such question was no longer in issue, and the defendant promptly excepting, the charge was erroneous upon the elementary principle that the charge of the court should be confined to the issues to be tried. *Good v. State*, 411.

88. To the law (Rev. Stats., Art. 4583) regulating the sale of certain stray animals is appended a proviso which, in effect, forbids the sale, even under legal notice, unless there be present at the sale at least three adult bidders besides the members of the family of the taker up. In the charge authorizing the jury to convict in the event they believed that three adult bidders besides the members of the defendant's family were not present at the sale, the court declined to instruct as to what constitutes a "family," but declared that question to be a matter of proof, and authorized the jury to construe the meaning of the term for themselves. *Held*, error; that the term, when applied to a particular state of facts, is a mixed question of law and fact; that it is the province of the court to declare the law, so far as the fact is governed by law, and so far as the fact is a question of proof, it is to be deduced by the jury from the evidence, and not from their personal knowledge. *Id.*

89. The facts in this case showed that the defendant, who claimed to own hogs running in the same range where the hogs in question were found, said that he supposed they belonged to him, called them up, and sold them to a third party, who, a day or two afterwards, took possession. The court, in substance, charged that the mere sale of the hogs was equivalent to a taking. *Held*, error; that in order to amount to theft, the seller of the stolen property must have had some manner of possession of the property. The rule is invariable that there must be an actual taking or a conversion of the stolen property in order to support a conviction for theft. *Madison v. State*, 435.

40. Charge of the court on the subject of possession of recently stolen property was as follows: "The possession alone of property shown to have been recently stolen is not in law sufficient to warrant the conviction of one charged with theft. Such possession, if proven, is only a circumstance for the jury to weigh and consider in connection with other established facts, in determining whether the accused is guilty of the offense charged or not. If, therefore, the alleged horse was stolen as charged, and if the said horse has been traced to the possession of defendant, such possession, if unsupported by other evidence, will not warrant the defendant's conviction; and if such be the case you will acquit the defendant. If, however, you find that such possession, if shown, is corroborated by other evidence, then, to warrant the defendant's conviction, all the evidence, taken and considered together, including the fact of possession, if it exists, should be sufficient to exclude from your minds every reasonable theory consistent with the defendant's innocence." *Held*, error, inasmuch as the charge was calculated to impress the jury with the idea that, if the mere fact of possession was corroborated, they were authorized to convict. The rule upon the subject is that there must be other evidence of guilt besides recent possession, and that such evidence, together with the recent possession, must be sufficient to estab-

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CHARGE OF THE COURT—*continued.*

lish in the minds of the jury the defendant's guilt to a moral certainty, beyond a reasonable doubt. *Tucker v. State*, 471.

41. Charge of the court presented the following instructions to the jury: "In considering the guilt or innocence of the defendant on trial, the jury are instructed that no act on the part of Tom Gill or others would justify or excuse the killing of Mark Gill, unless such other party acted under the advice or under the control of Mark Gill." *Held*, error, inasmuch as it did not require the advice to or control over Tom Gill or others to make the deceased a participant in their acts, and responsible therefor; but if deceased acted together with them, and, knowing their unlawful intent, aided them by acts, or encouraged them by words or gestures in the commission of the violence, or agreed thereto, then he was a principal in the assault upon defendant, and was subject to the same rules as if he was the person who actually committed the assault. *Cartwright v. State*, 473.

42. It is the duty of the trial court to instruct the jury upon every phase of case suggested by the proof, however slight may be the testimony supporting it. *Hobbs v. State*, 517.

43. In this case the defendant drove the stolen animal about ten miles from its range, and attempted to sell it. Pending negotiations of sale, it was discovered by parties acquainted with it, when the party with whom the sale was being negotiated told the defendant to turn it loose, and that they would get it at another time. In a few days the owner told the defendant that all he wanted was the animal, and that if he would drive it back home, he, the owner, would not prosecute him, the defendant. Soon after this the owner found the animal on its accustomed range. *Held*, that under such circumstances the court should have given in charge the issue as to the voluntary return of the animal by the defendant; that, while not strictly a return of actual possession, it was such as was demanded by the owner, and therefore sufficient. *Bird v. State*, 528.

44. See the opinion *in extenso* for a charge of the court which, though couched in the language of the Code, and correct in the abstract, is *held* error, inasmuch as its effect is to impose upon the defendant the burden of proving himself innocent of any unlawful intent to perpetrate any offense. *Thomas v. State*, 585.

45. Charge of the court instructed the jury as follows: "But while the defendant had the legal right to protect himself from such actual or supposed attack without retreating, and to use all the force necessary for that purpose, even to the extent of slaying his adversary, and he may continue to use force until all danger, actual or apparent, has passed, he cannot use any more force than was necessary for that purpose; and should you believe beyond a reasonable doubt that the deceased did assault the defendant, but that he abandoned said assault, and it reasonably appeared to the defendant that he had ceased all violence toward him, and that afterward the defendant shot the deceased, he would be guilty of manslaughter." *Held*, error, inasmuch as the charge, in effect, instructed that the jury must believe, beyond a reasonable doubt, that the deceased did assault the defendant before they could find the grade of

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CHARGE OF THE COURT—*continued*.

manslaughter. In other words, it reversed the rule which obtains in criminal cases, and applied the doctrine of reasonable doubt against, instead of in favor of, the defendant. See the opinion *in extenso* on the question. *Rockhold v. State*, 577.

46. Reasonable doubt is a doctrine that should be applied to the case as sought to be established by the State, and not to a defense set up by the accused. In this case if the jury believed the defendant was assaulted by the deceased, or if they had a reasonable doubt about it, the accused was entitled to that defense to the extent that they either believed or doubted the fact. *Id.*

47. Charge of the court instructed the jury as follows: "Implied malice is an inference or conclusion of law upon certain facts found by the jury. Thus the law implies malice from the unlawful killing of a human being, unless the circumstances make it evident that the killing was either justifiable, or, if not justifiable, was so mitigated as to reduce the offense below murder in the second degree." *Held*, error; not because it shifts the burden of proof, but because it infringes upon the doctrine of reasonable doubt, and authorizes the jury to apply the doctrine in behalf of the State, to the extent that the evidence should show, beyond a reasonable doubt, the existence of such facts as would justify or mitigate the homicide, instead of authorizing the jury, as it should, to apply it in behalf of the defendant, to the extent that the evidence should, beyond a reasonable doubt, establish the existence of malice. *Morgan v. State*, 598.

48. Insofar as the rule announced in the case of *Sharp v. The State*, 6 Texas Court of Appeals, 650, is in conflict with the doctrine above announced, that case is overruled. *Id.*

49. It is urged by the State that inasmuch as the court charged the jury to acquit if they had a reasonable doubt of the defendant's guilt of murder in the second degree, the error in the charge quoted was immaterial. *Held*, that the two charges are in direct conflict, and as the defendant promptly excepted, his exception must be sustained. *Id.*

50. Charge of the court upon the question of justifiable homicide required the defendant to resort to all other means, except flight, of preventing the threatened injury to himself, before taking life, regardless of the imminence of his peril. *Held*, error under the facts in proof. *Id.*

51. When the evidence adduced on a trial for murder tends to raise the issue of manslaughter, it is the duty of the trial judge to charge the law of that offense, regardless of his own opinion as to whether or not such evidence will justify a conviction for manslaughter. *Rutherford v. State*, 649.

## CIRCUMSTANTIAL EVIDENCE.

See CHARGE OF THE COURT. 19, 27.

PRACTICE, 17, 25.

1. Where the State has to rely exclusively upon circumstantial evidence to secure a conviction, it is incumbent on the trial court to give in charge to the jury the law controlling such evidence. *Howell v. State*, 98.

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**CIRCUMSTANTIAL EVIDENCE—continued.**

2. Circumstantial evidence alone being relied upon by the State to secure a conviction in this case, it was the imperative duty of the court, whether asked or not, to give in charge the law controlling such evidence. *Allen v. State*, 237.

**COMPLAINT.**

*See* INFORMATION, 2, 4.

**CONFESSIONS.**

1. It is provided by the statute, Article 749 of the Code of Criminal Procedure, that "the confession of a defendant may used in evidence against him if it appear that the same was freely made, without compulsion or persuasion, under the rules hereafter prescribed." The defendant in this case being neither in confinement nor under arrest when he made the confession, none of the rules prescribed by the succeeding Article apply in this case, and the admissibility of the confession depends on the common law. *Womack v. State*, 178.

2. In the absence of statutory provisions regulating confessions, other than such as are made when the defendant is in confinement or custody, the common law rule on the subject controls. That rule is as follows: "The confession (to be admissible in evidence) must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of threat or promise; for, however slight the threat or promise may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear, or of interest, than from a sense of guilt." The essence of the rule is that, to qualify the confession as evidence, it must have been voluntarily made, without the appliances of hope or fear by any other person. *Id.*

3. The prosecuting witness was permitted, over the defendant's objections, to testify that he told the defendant that he had consulted with the prosecuting attorney, and was authorized to say to the defendant that if he would turn State's evidence and testify against his co-defendant he would not be prosecuted, and that he, the witness, in his own behalf, promised the defendant that he would make no complaint against him if he would turn State's evidence and testify. Under these circumstances the purported confession was testified to have been made to the prosecuting witness by the defendant, and the prosecuting witness was permitted, over defendant's objection, to repeat the confession to the jury. The trial judge explained that his reason for admitting the confession was that, after having made the agreement to turn State's evidence and testify, the defendant not only repudiated the agreement and refused to testify, but denied having told the prosecuting witness anything. *Held*, that the court erred in admitting the confession; that the subsequent repudiation of the confession by defendant can in no way affect the circumstances under which it was made, and the true question was whether or not the defendant was improperly induced, by hope or fear, to make the confession to the prosecuting witness. If so, no subse-

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CONFESSIONS—*continued.*

quent act of bad faith on the part of the defendant could render valid that which *per se* was illegal as a voluntary confession. *Id.*

4. It is a common law rule that the confession of a defendant, induced by promises or threats that might have influenced his mind, is not admissible in evidence against him, under any circumstances. To this rule, however, we have a statutory exception, which qualifies such confession as evidence if, in connection with it, the accused makes a statement of facts or circumstances which are found to be true, and which conduce to establish his guilt of the offense charged. In this case the accused, without being warned, and in view of promises of the arresting officers of protection from mob violence, and of assistance to effect his escape, confessed that he killed the deceased, that his motive was robbery, that he killed him with a pistol and rocks, at a certain place, and dragged his body to a certain bluff and threw it in the Rio Grande, and that he secreted the money in a certain crevice. He pointed out the place of the murder, where two bloody rocks were found, and whence a heavy body had evidently been dragged to a bluff overlooking the river, and also a crevice in which the money was found. *Held*, that the extraneous statements of the accused having been found to be true, his confession comes properly within the exception to the general rule, and was properly admitted. *Weller v. State*, 200.

5. The decision in *Walker's case* (3 Texas Ct. App., 326) correctly states the rule of construction of the statute regulating the admission of confessions, as follows: "In this State, when a prisoner makes a statement of facts, and in consequence of such information the property stolen, the bloody clothes of the deceased, or the instrument with which he says the offense was committed, or any other material fact, is discovered, such statement, together with the confession of the crime itself, is proper testimony to go before the jury." *Id.*

6. Insofar as they hold that only such statements as are afterwards found to be true are admissible, excluding the remaining parts of the confession, the following cases are hereby overruled: *Davis v. The State*, 8 Texas Court of Appeals, 510; *Walker v. The State*, 9 Texas Court of Appeals, 38; *Massey v. The State*, 10 Texas Court of Appeals, 645; *Kennon v. The State*, 11 Texas Court of Appeals, 356. *Id.*

7. See the opinion *in extenso* for facts *held* to constitute such custody as to exclude the confession of an unwarned defendant. Note also evidence *held* not admissible under the rule which admits the unwarned confessions of facts by the accused which, being found to be true, conduce to the establishment of his guilt. *Owens v. State*, 448.

8. The ruling in *Weller's case*, *ante*, page 200, to the effect that if, in connection with the confession, a fact confessed was found to be true, and such fact conduced to establish guilt, the main fact, as well as all other facts, whether found true or not, are admissible, is approved. But see the opinion for evidence *held* not to come within the purview of the rule. *Id.*

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## CONSTITUTIONAL LAW.

See LOCAL OPTION LAW, 2.

1. Jurisdiction over misdemeanor cases is conferred by the Constitution upon the county and justices' courts. The district courts can supersede the county courts in such jurisdiction only when so empowered in the manner prescribed in Article 5, section 22, of the Constitution. The act of March 16, 1883 (Laws of Eighteenth Legislature, page 24), divested the county court of Atascosa county of jurisdiction over criminal cases, and vested in the district court of said county exclusive jurisdiction over criminal cases then pending in said county court. *Held*, that, in this manner the said district court was constitutionally invested with jurisdiction over misdemeanor cases. *Chapman v. State*, 76.

2. The act of the Legislature referred to proceeds as follows: "And the district court shall have and exercise all the civil and criminal jurisdiction heretofore vested in said county court by the Constitution and laws, and *not* divested by this act." *Held*, that under the recognized rule of statutory construction, that "when the intention of a statute is plainly discernable from its provisions, that intention is as obligatory as the letter of the statute, and will even prevail over the strict letter," the word "*not*," as used in the act, which would otherwise defeat the plain intent of the statute, must be held to have been used by mistake, and should be disregarded in construing the said statute. *Id.*

3. The jurisdiction conferred by the act under consideration upon the district court, is the same divested out of the county court, as to all cases not then pending in said county court; that is, the jurisdiction as to cases not pending is not exclusive, but only concurrent with the justices' courts in cases over which the justices' courts have heretofore had jurisdiction. Succinctly stated, the act referred to does not, in any way, affect the jurisdiction of the justices of the peace of Atascosa county. *Id.*

4. Section 10 of the Bill of Rights guarantees to any one accused of crime compulsory process to procure witnesses in his favor, but this right is regulated by Articles 488 and 489 of the Code of Criminal Procedure. Article 489 of that Code provides as follows: "Where a witness resides out of the county in which the prosecution is pending, the defendant shall be entitled, on application, either in term time or in vacation, to the proper clerk or magistrate, to have an attachment issued to compel the attendance of such witness. Such application shall be in writing and under oath, shall state the name of the witness and the county of his residence, and that his testimony is material to the defense." It is contended by the State that the effect of the act of April 23, 1883, entitled "An act to provide for the payment of attached witnesses in felony cases," is to so far repeal or modify Article 489 as to commit the matter to the sound discretion of the court when the application is made in term time. *Held*, that the position is untenable; that, tested as it must be by the title, the purpose of the said act of April 23, 1883, was simply to regulate compensation of attached witnesses in felony cases, and it in no way effected the repeal or modification of the Article 489 of the Code of Criminal Procedure. *Roddy v. State*, 502.

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CONSTITUTIONAL LAW—*continued*.

5. It is a constitutional provision that the subject matter of a legislative act shall be expressed in the title. The effect of this provision is to nullify any part of a legislative act not expressed in the title. *Id.*

6. Section 16 of Article 5 of the Constitution, which provides "that in all appeals from justices' courts there shall be a trial *de novo* in the county court, and when the judgment rendered or the fine imposed by the county court shall not exceed one hundred dollars, the trial shall be final," applies only to trials *de novo* on the merits in the county court, and not to such proceedings as were had in this case. *Taylor v. State*, 514.

## CONSTRUCTION OF STATUTES.

*See* CONSTITUTIONAL LAW.

HOMICIDE 4, 5, 6.

## JURISDICTION.

1. Though a subsequent statute on a given subject be not repugnant in all its provisions to a prior one on the same subject, yet if it clearly appears that the later statute was intended to prescribe the only rules which should govern the subject, the effect of the later statute is to repeal the former. *Harold v. State*, 157.

2. When a subsequent statute, revising the subject matter of a former one, is evidently intended as a substitute for it, although it contains no express words to such effect, it must be held to operate to repeal the former to the extent to which its provisions are revised and supplied. *Id.*

3. When a statute is revised, or one act is framed from another, some parts being omitted, the parts so omitted cannot be revived by construction, but are to be considered as annulled. *Id.*

4. It is true that a construction which repeals a former statute by implication is not favored, and it is equally true that statutes *in pari materia*, and relating to the same subject matter, are to be considered together; nevertheless it is a universal rule that when the new statute, in itself, comprehends the whole subject, and creates a new, entire and independent system respecting the subject matter, it repeals and supercedes all previous systems and laws respecting the same subject matter. *Id.*

5. Under the rules of construction announced, it is held that Article 694 of the Penal Code was repealed by the "Act for the protection of the wool growing interests of the State of Texas," passed April 4, 1883. *Id.*

6. By the act of January 22, 1875, Crockett county was created out of a portion of Bexar county. By the act of February 10, 1875, it was attached to Kinney county for judicial purposes. No further legislation was had concerning Crockett county until the adoption of the Revised Statutes, when it was embraced in the twentieth judicial district, but was not attached to any county for judicial purposes. By the act of April 28, 1882, it was again attached to Kinney county for judicial purposes, and again so attached by the act of April 9, 1883. It appears never to have been attached, for judicial purposes, to any county other than Kinney, and never to have been organized. Section 8 of the final title of the Revised Statutes provides as follows: "All civil statutes of a general nature, in force when the Revised Statutes take effect, and

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CONSTRUCTION OF STATUTES—*continued*.

which are not included herein, or which are not hereby expressly continued in force, are hereby repealed." *Held*, that the effect of the section quoted was to repeal the act of February 10, 1875, which was a statute of a general nature. *Held*, further, that in divesting Kinney county of jurisdiction over Crockett county, the effect of the repealing statute was to restore the jurisdiction of Bexar county, where it remained until the passage of the act of April 28, 1882, when it was again conferred upon Kinney. *Weller v. State*, 200.

7. Indictment was presented in the district court of Kinney county September 19, 1882, when Kinney county had jurisdiction over Crockett county, but it charged that the offense was committed in Crockett county on March 30, 1882, at which time Crockett county was under the jurisdiction of Bexar county. It does not appear, however, that Bexar county ever exercised or attempted to exercise jurisdiction over the case. Under the well settled rule that when the place where an offense is committed is, after the commission of the offense, created into a new county, such new county has jurisdiction over the offense, it is *held* that Crockett county, having been attached to Kinney county for judicial purposes, the indictment, laying the venue of the offense in the unorganized county of Crockett, was properly presented in Kinney county, which county had jurisdiction to try and determine the case. *Id.*

8. Article 367 of the Penal Code provides that "any court or officer having jurisdiction of the offenses enumerated in this chapter, or any district or county attorney, may subpoena persons and compel their attendance as witnesses. Any person so summoned and examined shall not be liable to prosecution for any violation of said articles about which he may testify." *Held*, that this privilege, which is extended to the witness merely to exempt him from prosecution under evidence which he might give criminating himself, is limited to the identical acts about which he testified, and to that extent will protect him; but it cannot be extended to any broader protection than that of which he has been deprived. *Kain v. State*, 282.

9. It is not the sale, but the following of the occupation of selling of intoxicating liquors without having first obtained license, that is the gravamen of the offense denounced by the statute of this State. *Standford v. State*, 381.

10. Under the statute in force prior to the adoption of the Revised Codes, the theft of a gelding was a specific offense. The word "horse" was not used in that statute in its comprehensive and generic sense, and did not include a "gelding," "mare" or "colt." Indictment for the theft of a gelding, presented before the adoption of the Revised Codes, properly described a stolen animal as a "gelding." *Johnson v. State*, 402.

11. The effect of Article 726 of the Revised Penal Code was to include in the generic term "horse" all animals of the horse kind, as distinguished from ass or mule, and to the extent of destroying all legal distinctions between the animals embraced, it operates to repeal the statute previously in force. The Final Title to the Revised Statutes, by express provision, prescribed for pending cases, both civil and criminal, the following rule:



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CONSTRUCTION OF STATUTES—*continued*.

"No offense committed, and no liability, penalty or forfeiture, either civil or criminal, incurred prior to the time when any statute, or part thereof, shall be repealed or altered by the Revised Statutes, shall be discharged or affected by such repeal or alteration; but prosecutions and suits for such offenses, liabilities, penalties or forfeitures, shall be instituted and proceeded with in all respects as if such prior statute or part thereof had not been repealed or altered, except that where the mode of procedure or matters of practice have been changed by the Revised Statutes, the procedure had after the Revised Statutes shall have taken effect in such prosecution or suit shall be, as far as practicable, in accordance with the Revised Statutes." Under this rule it was necessary in this case that the proof should have supported the allegation that the animal stolen was a "gelding," because the theft was committed before the revision of the Codes, and the indictment described the animal as a gelding. *Id.*

12. To apply the new provision (Article 746 of the Revised Penal Code) in a trial for horse theft committed before the Revised Codes took effect would be *ex post facto*, and it has been properly held that a variance between the allegation and the proof is fatal to the conviction, notwithstanding the trial was held since the Revised Statutes took effect. *Id.*

18. It is a constitutional provision that the subject matter of a legislative act shall be expressed in the title. The effect of this provision is to nullify any part of a legislative act not expressed in the title. *Roddy v. State*, 502.

14. The statute which requires a justice of the peace to approve an appeal bond from his judgment is only directory. *Taylor v. State*, 514.

15. The statute defining embezzlement (Penal Code, Article 876) includes only such bailments where the bailee had possession of the personal property for the benefit of the bailor, and not where its possession is held for the benefit of the bailee, such as for hire. *Reed v. State*, 586.

## CONSTRUCTION OF TERMS.

1. When used in a penal statute, the word "wilful" means more than it does in common parlance. It means with "evil intent," or "legal malice," or "without reasonable ground for believing the act to be lawful." In common parlance it is used in the sense of intentional, as distinguished from an accidental or involuntary act. In order, then, to have made the killing of the horse wilful, it must have been committed with evil intent, with legal malice, and without legal justification. *Lane v. State*, 172.

2. The indictment in this case charges as follows: "That J. H. Brown & C. C. Brown, J. A. True & J. H. True, late of the county of Young, on the fifteenth day of Jannary, in the year of Our Lord one thousand eight hundred and eighty-three, with force and arms, in the county of Young, and State of Texas, did then and there wilfully injure and deface the school house known as the Flat Rock school house, said house being then and there a public school house, and was then and

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CONSTRUCTION OF TERMS—*continued*.

there held by said Young county as a public school house; against the peace and dignity of the State." *Held*, that the sign "&," as used between the two words "Brown," and the two words "True," is synonymous with the conjunctive word "and," and sufficient to the validity of an indictment, though the use of the written word "and" is the better practice. *Brown v. State*, 245.

8. "Public buildings," as used in Article 417 of the Penal Code, are declared by Article 418 of the same Code to mean the "Capitol, and all other buildings in the Capitol grounds, at the seat of government, including the General Land Office and the Executive Mansion, the various State Asylums, and all buildings belonging to either; all college or university buildings erected by the State; all court houses and jails, and all other buildings held for public use by any department or branch of government, State, county or municipal; and the specific enumeration of the above shall not exclude other buildings not named, properly coming within the meaning and description of a public building." *Held*, that the indictment in this case is insufficient, inasmuch as where it is attempted to charge the injury or defacement of any other public building than those specifically enumerated in said Article 418 of the Penal Code, the indictment must allege that such building was a "public building," and was "held for public use." A private building might be a "public school house," and not within the purview of the statute. *Id*.

4. The word "wilful," when used in a penal statute, means with evil intent. *Id*.

5. In the construction of Article 4583, Revised Statutes, regarding the sale of certain estrays, the word "family" is *held* to mean the collective body of persons who live in one house, under one head or manager. *Goode v. State*, 411.

6. The gist of the offense of disturbing religious worship is that the disturbance was "wilful." The word "wilful," when used in a penal statute, means with evil intent, or legal malice, or without reasonable grounds of believing the act to be lawful. *Wood v. State*, 574; *Schubert v. State*, 645.

7. The term "prostitute" and "vagabond" are not synonymous. As the words are used in the statute, it is not every prostitute that is a vagabond, and *vice versa*; and while the Code declares that every *common* prostitute is a vagrant, which means the same as vagabond, it does not mean that every prostitute is a vagrant. The word "vagabond," as used in the statute, applies only to the *common* prostitute, the female who publicly sells her person indiscriminately to illicit intercourse with males, and not the female who surrenders her person to private prostitution. See the opinion *in extenso* on the question. *Springer v. State*, 591.

## CONTEMPT OF COURT.

See PRACTICE, 37.

WITNESS, 2.

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CONTINUANCE.

1. Objection that the trial court erred in refusing an application for a continuance must be presented by bill of exception. Otherwise, the question will not be considered by this court. *Spear v. State*, 98.

2. In the absence of proper bills of exception, this court will not revise the action of the court below in refusing a continuance, and in overruling a motion to change the venue. *Makinson v. State*, 183.

3. Not only must an application for a continuance show the materiality of the absent testimony, in order to be sufficient, but it must show the exercise of due diligence to secure it on the trial. The continuance in this case was properly refused. *Lane v. State*, 172.

4. This case was set for trial on the third day of April. On the fifth day of that month, and while the trial was in progress, the defendant asked for a continuance to procure the testimony of a certain witness. The application showed the necessary diligence in suing out an attachment for a witness who was under subpoena, and who had been in attendance upon the court during the previous days of the term, but was found to be absent on the day set for the trial. As a fact, however, this attachment did not issue until the next day, and was then returned not served. *Held*, that, having gone into trial, the defendant was not entitled to a continuance, unless he could show that, by some unexpected occurrence since the trial began which no reasonable diligence could have anticipated, he was so taken by surprise that he could not secure a fair trial. This application, however, shows no such surprise, and the court did not err in refusing the continuance at the stage of the proceedings at which it was asked. *Stanley v. State*, 392.

5. It is a rule of practice in this State that, even when an application for continuance lacks some of the statutory requirements, if the proposed evidence appears material and true, it should be considered and weighed in connection with the evidence adduced, on the motion for new trial. This rule must be held to apply equally to an application for a continuance which, like this for instance, is irregular and unauthorized. The evidence set forth in the application in this instance being clearly material and probably true, the same should have been considered on the motion for new trial. *Id.*

6. Continuance is properly refused in the first instance when the application fails to allege that the applicant has no reasonable expectation of being able to secure the attendance of the absent witnesses during the term of the court by a postponement of the trial to a future day thereof. *Beatey v. State*, 421.

7. While the overruling of an application for a continuance is not, *per se*, the subject of revision by this court, yet the application should be taken into consideration by the court below in passing upon the defendant's motion for new trial, and will be considered by this court in revising the action of the court below in refusing a new trial. See the statement of the case for evidence set up in a motion for new trial, which, considered in the light of the evidence adduced, demanded the award of a new trial. *Id.*

8. The rule stated, however, is not ordinarily applicable to a case

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**CONTINUANCE—continued.**

wherein it appears that the desired testimony was supplied from other sources, and that no injury resulted to the defendant by the action of the court in refusing the continuance. *Id.*

8. Failing to show the exercise of due diligence in the effort to secure the attendance of the alleged absent witnesses, an application for a continuance is properly refused. *Childers v. State*, 524.

**CONTINUOUS OFFENSES.**

*See* GAMING.

**DECREPIT PERSONS.**

The word "decrepit," as used in Article 496 of the Penal Code, has a more comprehensive meaning than that given to it by lexicographers, and a "decrepit person" must be held to be one who is disabled, incapable or incompetent from either physical or mental weakness or defects, whether produced by age or other causes, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength. Decrepitude may exist without the supervision of age. *Hall v. State*, 6.

**D.****DEFACING PUBLIC BUILDINGS.**

*See* CONSTRUCTION OF TERMS, 2.

INDICTMENT, 17, 18.

**DEPOSITIONS.**

1. Proof that a witness resided beyond the limits of the State sufficiently established the predicate for the introduction in evidence of his written testimony, taken before an examining court. *Cowell v. State*, 57.

2. It was urged against the competency of the written testimony that it was not sent to the clerk of the district court, sealed up in an envelope, etc. *Held*, that the objection was untenable, in view of the fact that the writing was identified as the testimony of the witness by the magistrate who reduced it to writing, and was properly certified to by him at the time it was subscribed and sworn to by the witness. *Id.*

**DILIGENCE.**

*See* CONTINUANCE.

Not only must an application for a continuance show the materiality of the absent testimony, in order to be sufficient, but it must show the exercise of due diligence to secure it on the trial. *Lane v. State*, 172.

**DISORDERLY HOUSE.**

1. Transcript on appeal must show affirmatively that the venue of the offense was proved on the trial. Otherwise, a conviction cannot stand. *Burtin v. State*, 156.

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**DISORDERLY HOUSE—continued.**

2. While the fact that the character of a house as a disorderly house, and that it is kept for the purpose of prostitution, may be proved by general reputation, such proof is inadmissible to prove that a person charged is the keeper of such house. *Id.*

8. Under the charter of the city of Dallas, the mayor's court of that city has concurrent jurisdiction with the county court over the offense of keeping a disorderly house. *Handley v. State*, 444.

4. The indictment in this case, charging the appellant with keeping a disorderly house on May 15, 1883, was filed May 25, 1883, and the trial was had on September 4, following. The defense interposed a plea of former acquittal before the mayor's court. The evidence showed that on the thirteenth day of June, 1883, upon a complaint charging her with keeping a disorderly house in Dallas, the defendant was acquitted on a trial before the mayor's court; that the testimony adduced on that trial was the same as that adduced on this trial; that it covered and embraced the whole period of time for and including the fourth day of April, 1883 (when she was convicted in the county court for keeping a disorderly house in Dallas), up to May 25, 1883, and that every act done by her in keeping the disorderly house during said period of time was proved on the trial in the mayor's court, and by the same witnesses who testified on this trial. *Held*, that whether or not the keeping of a house for public prostitution and as a common resort for prostitutes and vagabonds is an offense continuous in its nature, the plea of former acquittal, under the facts proved, should have prevailed. *Id.*

5. Whether or not the keeping of a disorderly house is an offense continuous in its nature was not considered by the trial court as an issue in this case, but he treated the plea of former acquittal as unsupported by the evidence, because the penalty prescribed by the city ordinance was not as great as that prescribed by the statute; for which reason he instructed the jury, in substance, to disregard the plea. The record discloses no such ordinance, and the trial judge must have assumed its existence or held that it devolved upon the defense to prove it; in which there was error. *Id.*

6. The Legislature having conferred upon the mayor's court of the city of Dallas jurisdiction over the offense of keeping disorderly houses, concurrent with the county court, the presumption obtains, until the contrary is shown, that the city ordinances have conformed the penalty to that of the State. *Id.*

7. Charge of the court properly instructed the jury that a former acquittal upon a charge of vagrancy cannot prevail as a plea in bar of a prosecution for keeping a disorderly house. *Wilson v. State*, 497.

8. See evidence *held* sufficient to sustain the plea of former acquittal in this case. *Id.*

9. Indictments in two cases charged that defendant "did wilfully and unlawfully keep a disorderly house, to wit: A house kept as a common resort for prostitutes." The Penal Code of this State, Article 339, defines a disorderly house as "one kept for the purpose of

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**DISORDERLY HOUSE—continued.**

public prostitution, or as a common resort for prostitutes *and vagabonds*." Exception was that the indictments were bad because they failed to allege that the house was kept as a common resort for both "prostitutes and vagabonds." *Held*, that to be sufficient, the indictments should have so charged; wherefore, the trial court erred in overruling the exception. *Springer v. State*, 591.

10. The term "prostitute" and "vagabond" are not synonymous. As the words are used in the statute, it is not every prostitute that is a vagabond, and *vice versa*; and while the Code declares that every *common* prostitute is a vagrant, which means the same as vagabond, it does not mean that every prostitute is a vagrant. The word "vagabond," as used in the statute, applies only to the *common* prostitute, the female who publicly sells her person indiscriminately to illicit intercourse with males, and not the female who surrenders her person to private prostitution. *Id.*

**DISTURBING RELIGIOUS WORSHIP.**

1. There must be some particularity, or what the law calls certainty, in an indictment. The particular act of which the State complains must be set forth in plain and intelligible words, so that the party who is accused may know what he is called upon to answer, and may be able to prepare for his defense. The indictment in this case charges the defendant with wilfully disturbing a congregation assembled for religious worship, but fails to allege the means or manner by which he disturbed the congregation. *Held*, that the indictment is bad, for uncertainty, wherefore the motion to quash the same should have been sustained. *Thompson v. State*, 159.

2. While in charging the offense of disturbing religious worship it is necessary that the means or manner of disturbance be alleged, it is not essential that the indictment enter into details. A general statement, as that it was effected by loud talking, swearing, whistling, etc., as the case might be, is sufficient. *Id.*

3. The statute in force when the case of *Kindred v. The State*, 33 Texas, 67, was decided, in which an indictment similar to this was held sufficient, and the statute now in force (Penal Code, Article 280), are materially different, and the *Kindred* case is no longer authority upon the question. *Id.*

4. The gist of the offense of disturbing religious worship is that the disturbance was "wilful." The word "wilful," when used in a penal statute, means with evil intent, or legal malice, or without reasonable grounds of believing the act to be lawful. *Wood v. State*, 574.

5. See evidence *held* insufficient to support a conviction for disturbing religious worship, inasmuch as it does not show the disturbance to have been wilful. *Id.*

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DYING DECLARATIONS.

1. It was objected to the dying declarations as evidence (reduced to writing) that the statement contained both competent and incompetent evidence. The objection being well taken, the rule applicable is as follows: "When a written instrument contains both legal and illegal evidence, the court cannot be required to expunge that which is illegal. If the court points out to the jury the illegal testimony, and designates it so that the jury can identify it, it is all that can be required." *Barber, Ex Parte*, 369.

2. A correct rule of evidence is thus stated: "A statement by the deceased of a distinct fact, not connected with the circumstances of the death or the immediate cause of it, is not admissible as a dying declaration, though competent and legal evidence if established by any other competent witness." *Id.*

## E.

## EMBEZZLEMENT.

1. The indictment contained two counts, one for embezzlement of goods held on commission by the accused, and the other for the conversion or embezzlement of the proceeds. The goods were received in B. county, and the proceeds converted in W. county. After the evidence was submitted, the State elected to claim a conviction on the count charging the embezzlement of the goods. *Held*, that the venue of the offense, under the count elected, was properly laid in B. county, the district court of which county had jurisdiction under Article 219 of the Code of Criminal Procedure, which provides that "the offense of embezzlement may be prosecuted in any county in which the offender may have taken or received the property, or through or into which he may have undertaken to transport it." Had the State elected to proceed on the second count, jurisdiction would have belonged to the district court of W. county, wherein the goods were sold and the proceeds appropriated. *Cole v. State*, 461.

2. As defined in a former decision of this court (*Leonard v. The State*, 7 Texas Ct. App., 419), "embezzlement is a fraudulent appropriation of the property of another by a person to whom it has been entrusted. There is no settled mode by which this appropriation must take place, and it may occur in any of the numberless methods which may suggest itself to the particular individual. The mode of embezzlement is simply matter of evidence, and not pleading." In the same opinion, with regard to the question of intent, it is held: "If he (the accused) sold it (the property) with the honest purpose of delivering the proceeds to the owner, and after such sale conceived the fraudulent intention, he would not be guilty of embezzlement. \* \* \* But if the sale was simply a means to effectuate his fraudulent purpose to convert the property to his own use—in other words, to steal it—it is as much an act of conversion as if he had shipped it clandestinely to a foreign port and there disposed of it." The princi-

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**EMBEZZLEMENT—continued.**

ple embraced in the requested charge on the subject having been, by the general charge, submitted in harmony with the rules thus declared, the requested charge was properly refused. *Id.*

3. See this case for evidence *held* sufficient to sustain a conviction for embezzlement. *Id.*

4. A prosecution for embezzlement may be maintained in the county in which the accused took or received the property embezzled, or through or into which he may have undertaken to transport it. *Reed v. State*, 586.

5. The statute defining embezzlement (Penal Code, Article 876) includes only such bailments where the bailee had possession of the personal property for the benefit of the bailor, and not where its possession is held for the benefit of the bailee, such as for hire. *Id.*

6. To sustain a conviction for embezzlement in a county other than that in which the property was received, it must be shown that when the accused received the property in the latter county he undertook to transport it into the county where the conviction was had. *Id.*

7. See the statement of the case for evidence held insufficient to support a conviction for embezzlement, inasmuch as it does not establish the allegation of ownership. *Livingston v. State*, 652.

**ESTRAYS.**

See UNLAWFUL SALE OF ESTRAYS,

**EVIDENCE.**

See AGGRAVATED ASSAULT, 1.

CHARGE OF THE COURT, 1.

CONFESSIONS.

DECREPIT PERSON.

DEPOSITIONS.

DYING DECLARATIONS.

LEADING QUESTIONS.

MISNOMER.

PRACTICE, 26.

VARIANCE.

WITNESS.

1. The first count in the indictment alleged that the assault and battery was committed by an adult male upon a female. An adult is a person who has attained the full age of twenty-one years. The defendant produced the positive testimony of his father that he was not twenty-one years of age at the time of the trial. The only testimony tending to contradict this evidence was the statement of the prosecutrix, who testified that she thought the defendant was twenty-one years old, but whether this had reference to the time of the offense or that of the trial does not appear, nor did the witness testify that she knew the age of the defendant. *Held*, first, that the evidence was insufficient to support the allegation that the defendant was an adult male; and second, that the mere opinion of the State's witness was not sufficient to confute the positive testimony of the defendant's. *Hall v. State*, 6.

2. In a prosecution for the theft of a mare it was proved by the State that the animal was running in her accustomed range in C. county, and had been there for a week prior to the time she was seen in the defendant's possession in D. county. *Held*, sufficient to prove that, when taken, the animal was in C. county. *Ashlock v. State*, 13.



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**EVIDENCE—continued.**

3. Leading questions are such as plainly suggest to the witness the answers sought to be elicited by the interrogator. "Did K. and R. tell you the day they saw the man in D.?" was not a leading question. *Id.*

4. The question as propounded called for and elicited hearsay testimony, but, in view of the fact that K. and R. testified as witnesses in the case, and stated in their testimony that they told the witness of whom the question was asked precisely what the said witness testified they told him, the admission of the answer to the said question is *held* not to be such error as to warrant the reversal of the conviction. *Id.*

5. As tending to show bias, and for the purpose of enabling the jury to properly weigh the testimony of witnesses for the defense, it was proper to allow the State, on cross-examination, to elicit from such witnesses the fact that they testified before the grand jury in the same case, without being subpoenaed, and at the instance of the defendant; and in referring to the facts so elicited, in argument, the counsel for the State did not abuse his privilege. *Id.*

6. It is a well settled rule of practice that, "when necessary to establish identity in developing the *res gestæ*, or in making out the guilt of the accused by circumstances connected with the theft, or to explain the intent with which the accused acted with respect to the property for the theft of which he is on trial, it is competent for the State to prove that other property was stolen at or about the same time and in the same neighborhood from which the property in question was stolen; and that this other property was found in the possession of the defendant when arrested for the theft of the property for which he is on trial. Under such state of case, however, it is the duty of the court to explain, in the charge to the jury, the purpose of such proof." *House v. State*, 25.

7. The application of the rule stated, in all cases wherein it can be invoked, is controlled absolutely by the character of the evidence adduced on the trial. Whether or not it tends sufficiently to the establishment of a defense, or a mitigation of the offense, as to reasonably demand a charge, is a question primarily committed to the sound discretion of the court below, and then to this court on appeal. If its force is deemed very weak, trivial, light, and its application remote, the court should not charge upon it. If, however, it is so pertinent and forcible that it might, in reason, be expected to influence the jury in reaching a verdict, the court should so charge as to furnish them with the appropriate rule of law upon the subject. Note in this case the defense set up, and evidence *held* not to be of such a character as to demand a charge, in the absence of exception or requested instruction. *Elam v. State*, 34.

8. In a prosecution for purchasing cattle without taking a bill of sale, the defendant proposed to prove that another person, to whom he gave money for the purpose, purchased the cattle for him, received them for him, and gave him a bill of sale which he said at the time was the bill of sale to the said cattle. He also offered in evidence the bill of sale. This evidence was excluded as irrelevant. *Held*, error; that, if defendant did

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EVIDENCE—*continued.*

in fact purchase the cattle through an agent, and the cattle were delivered to the agent in the absence of the defendant, he was entitled to such proof, which would constitute a good defense, unless it further appeared that he consented to the receiving of the cattle by his agent without a bill of sale. *Brockman v. State*, 54.

9. The State was properly permitted to prove that the words "Muscogee" and "Creek" signify the same thing, and that the "Muscogee Nation" is the same as the "Creek Nation." Such proof, however, was not necessary, inasmuch as it was a matter of which the court was authorized to take judicial notice. *Cowell v. State*, 57.

10. The trial court admitted in evidence the printed Code of Laws of the Muscogee Nation, and in this action it did not err, the book purporting to be published by authority of the said Nation, and being certified to be a true copy of the manuscript laws of that Nation, which certificate was authenticated by the signature of the Principal Chief of that Government, under the great seal thereof. *Id.*

11. The indictment charged that the rape was committed "by force, and did not include a count that it was effected by threats. The State was permitted to prove that when the injured party attempted to give the alarm, the defendant placed his hand over her mouth, and commanded her to desist on pain of death. To this evidence the defense objected, because force was the only means alleged in the indictment. But *held*, that the evidence was admissible; first, because it was *res gesta*; second, because it bore directly upon the question of consent; third, because it showed the intent of the assailant; and fourth, because it was an important fact to be considered in passing upon the character and degree of force used by defendant to accomplish his purpose. *Bass v. State*, 62.

12. With regard to force, in the perpetration of rape, the statute, Article 529 of the Penal Code, requires that it shall be such as might reasonably be supposed to be sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances in the case. In determining upon the sufficiency of the force used, the jury is authorized to take into consideration threats made at the time of the commission of the offense. *Sharp v. The State*, 15 Texas Court of Appeals, 171, cited and approved. *Id.*

13. See evidence held sufficient to support a capital conviction for rape. *Id.*

14. Professional physicians being called to testify solely as medical experts, it was proper to exempt them from the operation of "the rule." Moreover, the enforcement of the rule as to the sequestration of witnesses is matter largely committed to the discretion of the trial judge, and one which will not be revised unless injury to the defendant is made manifest. *Spear v. State*, 98.

15. See the statement of the case for circumstantial evidence held sufficient to support a conviction for murder in the first degree. *Id.*

16. In a trial for robbery, the prosecuting witness was asked, upon cross-examination, if he did not, just before the institution

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**EVIDENCE—continued.**

of the prosecution, have a conversation with the defendant regarding the latter's knowledge of an alleged incestuous intercourse between the witness and his niece. *Held*, admissible on the question of the *animus* of the witness, for which reason, as shown by the bill of exceptions, the question was propounded; and the trial court erred in refusing to require the witness to answer. *Trimble v. State*, 115.

17. See evidence *held* insufficient to establish guilt beyond a reasonable doubt, and newly discovered evidence of such character as to have authorized and required the award of a new trial. *Id.*

18. Any evidence from which the jury can infer the value of a stolen chattel is evidence; as, for instance, what the owner testifies of its value to him, the opinions of witnesses acquainted with the value of like property, what such property has brought at actual sales, etc. *Martínez v. State*, 122.

19. In a prosecution for the theft of a saddle, but one witness located the saddle in the possession of the defendant, and that witness was the party in whose possession it was found. Having testified that he purchased the saddle from the defendant, the defendant, for the purpose of laying a predicate to impeach the witness by showing his complicity in the theft, asked the witness on cross-examination the following question: "Did your wife, in your presence, at your house, and in the presence of Juan Montez and F. Gallan, on the tenth day of December, 1883, deny that the saddle was in your house, and deny all knowledge of said saddle?" *Held*, that for the purpose it was asked, the question was competent, and the exclusion of the answer thereto was error. *Id.*

20. The record, on appeal, must show that the venue of the offense was established by evidence; otherwise a conviction cannot stand. *Gonzales v. State*, 152.

21. A State's witness was permitted, over objection, to state what the prosecuting witness told him about the alleged assault the day after it occurred; and, in testifying about blood spots he saw upon the floor, to state what the prosecuting witness said to him as to how they came there. *Held*, error, as being clearly hearsay, and no part of the *res gesta*, nor otherwise competent. *Id.*

22. The prosecuting witness having stated, on cross-examination, that she was induced by the county attorney to make complaint against the defendant in this case, it was proper to admit, on behalf of the State, evidence to rebut and contradict the witness as to such statement. *Id.*

23. Transcript on appeal must show affirmatively that the venue of the offense was proved on the trial. Otherwise, a conviction cannot stand. *Burton v. State*, 156.

24. While the fact that the character of a house as a disorderly house, and that it is kept for the purpose of prostitution, may be proved by general reputation, such proof is inadmissible to prove that a person charged is the keeper of such house. *Id.*

25. When used in a penal statute, the word "wilful" means more than it does in common parlance. It means with "evil intent," or "legal mal-

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EVIDENCE—*continued*.

ice," or "without reasonable ground for believing the act to be lawful." In common parlance it is used in the sense of intentional, as distinguished from an accidental or involuntary act. In order, then, to have made the killing of the horse wilful, it must have been committed with evil intent, with legal malice, and without legal justification. *Lane v. State*, 172.

26. It is provided by the statute, Article 749 of the Code of Criminal Procedure, that "the confession of a defendant may used in evidence against him if it appear that the same was freely made, without compulsion or persuasion, under the rules hereafter prescribed." The defendant in this case being neither in confinement nor under arrest when he made the confession, none of the rules prescribed by the succeeding Article apply in this case, and the admissibility of the confession depends on the common law. *Womack v. State*, 178.

27. In the absence of statutory provisions regulating confessions, other than such as are made when the defendant is in confinement or custody, the common law rule on the subject controls. That rule is as follows: "The confession (to be admissible in evidence) must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of threat or promise; for, however slight the threat or promise may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear, or of interest, than from a sense of guilt." The essence of the rule is that, to qualify the confession as evidence, it must have been voluntarily made, without the appliances of hope or fear by any other person. *Id.*

28. The prosecuting witness was permitted, over the defendant's objections, to testify that he told the defendant that he had consulted with the prosecuting attorney, and was authorized to say to the defendant that if he would turn State's evidence and testify against his co-defendant he would not be prosecuted, and that he, the witness, in his own behalf, promised the defendant that he would make no complaint against him if he would turn State's evidence and testify. Under these circumstances the purported confession was testified to have been made to the prosecuting witness by the defendant, and the prosecuting witness was permitted, over defendant's objection, to repeat the confession to the jury. The trial judge explained that his reason for admitting the confession was that, after having made the agreement to turn State's evidence and testify, the defendant not only repudiated the agreement and refused to testify, but denied having told the prosecuting witness anything. *Held*, that the court erred in admitting the confession; that the subsequent repudiation of the confession by defendant can in no way affect the circumstances under which it was made, and the true question was whether or not the defendant was improperly induced, by hope or fear, to make the confession to the prosecuting witness. If so, no subsequent act of bad faith on the part of the defendant could render valid that which *per se* was illegal as a voluntary confession. *Id.*

29. See statement of the case for evidence, in a theft case, *held* insufficient to establish the complicity of the accused in the taking. *Id.*

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EVIDENCE—*continued*.

80. It is a common law rule that the confession of a defendant, induced by promises or threats that might have influenced his mind, is not admissible in evidence against him, under any circumstances. To this rule, however, we have a statutory exception, which qualifies such confession as evidence if, in connection with it, the accused makes a statement of facts or circumstances which are found to be true, and which conduce to establish his guilt of the offense charged. In this case the accused, without being warned, and in view of promises of the arresting officers of protection from mob violence, and of assistance to effect his escape, confessed that he killed the deceased, that his motive was robbery, that he killed him with a pistol and rocks, at a certain place, and dragged his body to a certain bluff and threw it in the Rio Grande, and that he secreted the money in a certain crevice. He pointed out the place of the murder, where two bloody rocks were found, and whence a heavy body had evidently been dragged to a bluff overlooking the river, and also a crevice in which the money was found. *Held*, that the extraneous statements of the accused having been found to be true, his confession comes properly within the exception to the general rule, and was properly admitted. *Weller v. State*, 200.

81. The decision in Walker's case (3 Texas Ct. App., 326) correctly states the rule of construction of the statute regulating the admission of confessions, as follows: "In this State, when a prisoner makes a statement of facts, and in consequence of such information the property stolen, the bloody clothes of the deceased, or the instrument with which he says the offense was committed, or any other material fact, is discovered, such statement, together with the confession of the crime itself, is proper testimony to go before the jury." *Id.*

82. Insofar as they hold that only such statements as are afterwards found to be true are admissible, excluding the remaining parts of the confession, the following cases are hereby overruled: *Davis v. The State*, 8 Texas Court of Appeals, 510; *Walker v. The State*, 9 Texas Court of Appeals, 88; *Massey v. The State*, 10 Texas Court of Appeals, 645; *Kennon v. The State*, 11 Texas Court of Appeals, 356. *Id.*

83. A witness for the State, in a trial of a murder case, was permitted, over objection, to testify that on the morning of the day on which the deceased was killed, he rode up to where the deceased was at work; that the deceased seemed agitated and excited and told him that he, deceased, was afraid of that Mexican, meaning the defendant; that this conversation occurred about two hours before the killing occurred, and that the defendant was in sight at the time, but not near enough to hear the said conversation between the witness and the deceased. *Held*, that in the admission of such evidence the trial court erred, inasmuch as it was clearly hearsay, and did not come within any of the exceptions to the general rule which rejects hearsay evidence. *Segura v. State*, 221.

84. Indictment for the theft of a watch and chain from the person of the owner alleged the aggregate value of the two articles. *Held*, not error to admit evidence of the value of the watch alone. *Bennett v. State*, 236.

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**EVIDENCE—continued.**

85. The State presented in evidence the affidavit of the owner of the alleged stolen property, to the effect that he never gave his consent to the taking of the property. To this affidavit was attached an agreement signed by the State's counsel and by the defendant and his counsel, and an attesting witness, to the effect that the affidavit should be read in evidence as the testimony of said owner. When offered, the defendant objected to it because, 1, the defendant had the right to be confronted by witnesses against him; and 2, because it was not proved that the defendant had ever signed the agreement. *Held*, that the first objection was not tenable because the defendant had the personal power to waive any right secured to him except the right of trial by jury. *Held*, further, that the second objection was tantamount to a denial that the defendant executed the agreement. Under such circumstances it was incumbent on the State to prove its execution, either by the attesting witness, if accessible, and if not, by competent secondary evidence, before the agreement or affidavit could be received in evidence. *Allen v. State*, 237.

86. In a prosecution for the theft of a mare, the defendant proposed to prove by a witness that at the time he, the defendant, returned on the morning that he went out to hunt his two horses, and after he returned to the K. ranch, he stated to the witness that he, defendant, had failed to find but one of his horses; that some person had taken his other horse, and that he found the mare in question with his horse that was not taken; that he intended to take the said mare to Uvalde and see if he could find her owner; that he supposed the person who took his missing horse left the mare with his other horse, that if he could find the mare's owner in Uvalde county he would deliver up the animal, and that he, the defendant, did not claim the mare. *Held*, that while not technically *res gestæ*, the proposed evidence was competent, not only to show the character of defendant's possession, but the defendant's intent in connection with his possession; wherefore the court erred in excluding the proposed evidence. *Saltillo v. State*, 249.

87. See evidence *held* insufficient to support a conviction either for theft of a horse, or for driving it from its accustomed range. *Id.*

88. New trial should be awarded by the trial court when the evidence is clearly insufficient to support a conviction. *Id.*

89. When offered in evidence, the recognizance was objected to, because it recited that D. had been convicted of swindling, for which offense he had not been indicted. For the reasons enumerated in the preceding head notes, the objection was properly overruled. *Martin et al. v. State*, 265.

40. In the original bond, sent up for inspection, the name of a surety had been erased by ink lines drawn across it, so as to obliterate it. It was objected, to the competency of the bond as evidence, that it first devolved upon the State to satisfactorily explain the erasure, and show that it was made under circumstances that did not affect the rights of the obligors. *Held*, that the objection was well taken. *Collins v. State*, 274.

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**EVIDENCE—continued.**

41. The exhibition of a gaming table, for the purpose of obtaining betters, which is the gist of the offense, is not an offense continuous in its nature, within the meaning of the law. *Kain v. State*, 282.

42. When a defendant interposes the plea of *autrefois acquit* or *convict*, the burden of proving the identity of himself as the party formerly acquitted or convicted and the identity of the offense, is upon him; and the State can under no circumstances be required to establish the contrary. *Id.*

43. Proof of identity of the offense is not made by proof that the offense of which the defendant has been acquitted or convicted, and that for which he is on trial, are identical in nature, name and designation; but it must be made by showing the identity of the very acts or omissions which constituted the offense—that the acts which constituted the offense for which the former acquittal or conviction was had are the very acts which constitute the offense on trial. *Id.*

44. It has been stated as a rule that "the burden of proving a prior conviction of the offense charged against a defendant being upon him, it is not shifted by *prima facie* evidence of the identity of the offense of which he has been previously convicted with that charged upon him." This rule, without modification, does not hold good in this State; for if the evidence makes a *prima facie* case in support of the plea, it must preponderate in its favor, and a preponderance of proof will suffice to support the plea. *Id.*

45. The information in this case charges the appellant with *keeping* the gaming table as well as *exhibiting* the gaming table. The verdict and judgment fail to show for which (the keeping or the exhibiting of the same) the appellant was convicted, and it is therefore urged by appellant that he is relieved from the burden of proving the identity of the offense. *Held*, that the proposition is untenable; that, though it be conceded that the keeping of a gaming table is an offense continuous in its nature, the exhibition of a gaming table is not; and, to be available, the evidence in support of the plea of former acquittal or conviction must meet the whole case, and is not sufficient if it leaves it in doubt whether the former conviction was had for the keeping or the exhibition of the table. *Id.*

46. As tending to show a motive for the defendant to kill the deceased, it was proper to admit in evidence an affidavit charging the defendant with an offense, made by the deceased a short time before her death, and upon which a prosecution was pending at the time of that event. *Robinson v. State*, 847.

47. It was error to permit a witness to state what the deceased told her about a third party beating her nearly to death, such evidence being hearsay, and no part of the *res gesta*, and in no way connected with or bearing upon the issue of the defendant's guilt. It did not appear that what the deceased said was in explanation of her then sickness and was a part of the *res gesta* of it. *Id.*

48. See the statement of the case for evidence *held* insufficient to support a conviction for murder in the first degree; wherefore a new trial should have been awarded. *Id.*

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**EVIDENCE—continued.**

49. It is a rule of evidence that all the circumstances of a transaction may be submitted to the jury, provided they afford any fair presumption or inference as to the matter in issue. *McMahon v. State*, 357.

50. It was objected to the dying declarations as evidence (reduced to writing) that the statement contained both competent and incompetent evidence. The objection being well taken, the rule applicable is as follows: "When a written instrument contains both legal and illegal evidence, the court cannot be required to expunge that which is illegal. If the court points out to the jury the illegal testimony, and designates it so that the jury can identify it, it is all that can be required." *Barber, Ex Parte*, 369.

51. A correct rule of evidence is thus stated: 'A statement by the deceased of a distinct fact, not connected with the circumstances of the death or the immediate cause of it is not admissible as a dying declaration, though competent and legal evidence if established by any other competent witness.' *Id.*

52. To warrant the conviction of two or more persons as principals in the same offense, the evidence must show such co-operation or complicity between them as constituted them principals. *Washington v. State*, 376.

53. Appellant and one R. were separately indicted and tried as principals in the murder of the former's wife. At neither trial was there any evidence tending to show co-operation or complicity between them in the commission of the homicide, and yet, upon the same state of proof, each of them was convicted as a principal in the murder. *Held*, that in this condition of affairs the two convictions are irreconcilably repugnant to each other, and in the present case the court below erred in refusing a new trial. *Id.*

54. It was proper to permit the State to prove that a few minutes after the deceased and his brother were shot, the defendant and another man were seen at the house of the deceased's father, and also to prove the language and conduct of the defendant at that time and place. The said testimony related to matters which transpired immediately after the shooting, and were closely connected with the shooting, and therefore they were part of the *res gestæ*. *Cartwright v. State*, 473.

55. It is a well settled general rule that an attorney cannot be permitted to disclose communications made to him by his client in the course of their professional relations. It is no exception to this rule that the client turned State's evidence against his co-defendant and testified for the prosecution; wherefore the trial court properly refused to permit the defendant's counsel to state in evidence communications made to him by the defendant while the relation of attorney and client existed. *Sutton v. State*, 490.

56. The doctrine that, in order to justify a conviction for theft committed out of the State, it must be shown, with other requisites, that the party who committed the theft brought the property into this State, or, at least, that he had possession or control over it after it came into this State, is unquestionably supported



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**EVIDENCE—continued.**

by the letter of the law. But, if the proof shows that the accused aided in taking the stolen property in another State, furnished the means for its transportation into this State, came to this State himself in pursuance of an agreement to do so, and in this State received his portion of the fruits of the crime, he, in contemplation of law, brought the property into this State, exercised possession and control over it in this State, and was, from its inception, a principal in the crime. *Id.*

57. After their retirement, the jury returned into court and requested further instructions as to whether or not they were authorized to consider facts proved to have transpired in Texas, in determining whether or not the accused was present when the property was stolen in the Chickasaw Nation. The court charged as follows: "In order to determine whether or not the defendant was present at the commission of the alleged offense, the jury are authorized to take into consideration all the facts and circumstances proven in the case in so far as the same have any bearing on the question, without reference to which side of the river (State line) they may have occurred." *Held*, correct. *Id.*

58. Bill of exceptions reserved to the action of the court in sustaining objections to proposed testimony, which fails to disclose the evidence sought to be elicited, and the grounds urged to it and sustained, is not sufficient to enable this court to determine the relevancy and materiality of the rejected evidence, and hence its exclusion cannot be held error. *Id.*

59. The competency as evidence of a defendant's explanation, made directly after the commission of the alleged offense, depends entirely upon whether or not such explanation, if material, is also a part of the *res gestæ*. In determining whether or not such explanation is or is not a part of the *res gestæ*, the test is, were the declarations the facts talking through the party, or the party talking through the facts? In this case the bill of exceptions taken to the rejection of the proposed explanation fails to disclose what that explanation was. Under such circumstances, this court cannot pass upon the question of materiality. *Hobbs v. State*, 517.

60. An indictment for swindling having unnecessarily described the money obtained by fraudulent representations to be "good, lawful and current money of the United States of America," it was essential to the validity of the conviction that the money be proved as alleged. *Chil. ders v. State*, 524.

61. See the opinion *in extenso* for evidence held insufficient to sustain a conviction for swindling. *Id.*

62. Voluntary return of stolen property, such as under the provisions of Article 378 of the Penal Code will operate to reduce a theft from the grade of felony to misdemeanor, must be made under the following circumstances: 1. The return must be voluntary, that is, willingly made; not made under the influence of compulsion, fear of punishment or threats. If, however, it be made under the influence of repentance for the crime, and with the desire to make reparation to the injured owner, it will be voluntary, although it may also be influenced by fear of

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EVIDENCE—*continued*.

punishment. 2. It must be made within a reasonable time after the theft, and before prosecution for the theft has been commenced. 3. It must be an actual, not merely a constructive return of the property into the possession of the owner. 4. The property returned must be the identical property, unchanged and all of it, that was stolen. *Bird v. State*, 528.

63. In order to sustain a conviction for assault with intent to commit rape, the proof must show that the assault was committed with the specific intent to *rape*. No other intent will suffice. For instance, a conviction for such offense is not supported by proof that the accused assaulted a woman with the intent of having improper connection with her, without the use of force, nor without her consent. *Thomas v. State*, 535.

64. See the statement of the case for evidence *held* insufficient to support a verdict for assault on rape, inasmuch as it fails to establish the essential element of intent. *Id.*

65. The explanation of a defendant when first found in possession of stolen property, if reasonable, imposes upon the State the burden of proving its falsity. *Ross v. State*, 554.

66. The difficulty which culminated in this homicide had its origin in trouble between a husband and wife, the wife, at the time of the homicide, being a guest of the deceased. Under the circumstances this court cannot hold improper the cross-examination of a witness for the defense that sought to disclose the relations existing between the defendant and the wife. See the opinion for the state of case. *Rockhold v. State*, 577.

67. Even in cases where the obstruction is placed upon the road proper, the evidence must show that the obstruction was wilful. *A fortiori*, when the obstruction is consequential—arises from an act which the accused had the legal right to do—the evidence must show that the act was wilfully done, and with a view to such indirect or consequential effects. *Schubert v. State*, 645.

## EXHIBITING GAMING TABLE.

See GAMING.

## EX POST FACTO.

See CONSTRUCTION OF STATUTES, 12.

## F.

## FACT CASES.

1. Evidence sufficient to sustain a conviction for horse theft. *Elam v. State*, 34.

2. Evidence sufficient to sustain a conviction for horse theft. *Cowell v. State*, 57.

3. Evidence sufficient to sustain a capital conviction for rape. *Bass v. State*, 62.

4. Evidence sufficient to sustain a capital conviction for murder. *Escareno v. State*, 85.

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FACT CASES—*continued*.

5. Evidence sufficient to support a verdict of murder in the first degree. *Spear v. State*, 98.
6. Evidence sufficient to support a conviction for robbery. *Makinson v. State*, 133.
7. See statement of the case for evidence, in a theft case, *held* insufficient to establish the complicity of the accused in the taking. *Womack v. State*, 178.
8. Evidence sufficient to support a conviction for circulating a libel. *Woody v. State*, 252.
9. Evidence insufficient to sustain pleas of former acquittal and conviction of exhibiting a gaming table. *Kain v. State*, 282.
10. Evidence insufficient to support a conviction for burglary. *Zollicoffer v. State*, 312.
11. Evidence insufficient to sustain a conviction for theft. *Harrison v. State*, 325.
12. Evidence insufficient to sustain a conviction for unlawfully selling liquor. *Standford v. State*, 331.
13. Evidence insufficient to sustain a conviction for obstructing a public road. *Davidson v. State*, 336.
14. Evidence insufficient to sustain a conviction for murder in the first degree. *Robinson v. State*, 347.
15. Evidence insufficient to sustain a conviction for horse theft. *Johnson v. State*, 402.
16. Evidence insufficient to sustain a conviction for murder in the second degree. *Turner v. State*, 433.
17. Evidence insufficient to show a fraudulent taking of the property in question. *Madison v. State*, 435.
18. Evidence sufficient to sustain a conviction for embezzlement. *Cole v. State*, 461.
19. Evidence insufficient to sustain a conviction for horse theft. *Tucker v. State*, 471.
20. Evidence sufficiently corroborative of an accomplice witness to support a conviction for horse theft. *Sutton v. State*, 490.
21. Evidence sufficient to establish a plea of former acquittal in a prosecution for keeping a disorderly house. *Wilson v. State*, 497.
22. Evidence in a trial for assault to rape *held* insufficient to prove the specific intent to rape. *Thomas v. State*, 535.
23. Evidence insufficient to sustain a conviction for burglary. *Ross v. State*, 554.
24. Evidence insufficient to establish a homicide, and hence insufficient to support a conviction for murder in the second degree. *Treadwell v. State*, 560.
25. Evidence insufficient to sustain a conviction for disturbing religious worship because it does not show the disturbance to have been wilful. *Wood v. State*, 574.
26. Evidence insufficient to sustain a conviction for theft, because it fails to establish ownership and fraudulent intent. *Fletcher v. State*, 635.
27. Evidence insufficient to sustain conviction for embezzlement, because it does not sustain allegation of ownership. *Livingston v. State*, 652.

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## FAMILY.

See CONSTRUCTION OF TERMS, 5.

## FALSE IMPRISONMENT.

1. The ordinances of the incorporated town of D. making drunkenness and breaches of the peace offenses, the marshal of the town or his deputy was authorized, without warrant, to arrest a party infringing such ordinances in his view. The fact that the drunken man's proposition when first arrested, to give bond, was refused and he was confined in the calaboose for an hour, will not authorize a conviction for false imprisonment. *Beville v. State*, 70.

2. Upon the question of the right of the deputy marshal to arrest a party detected in the violation of the ordinance, the trial court charged that, in order to make a valid arrest, such officer must have "express" authority. *Held*, error. *Id.*

## FORMER ACQUITTAL.

See FORMER CONVICTION.

1. The indictment in this case, charging the appellant with keeping a disorderly house on May 15, 1883, was filed May 25, 1883, and the trial was had on September 4, following. The defense interposed a plea of former acquittal before the mayor's court. The evidence showed that on the thirteenth day of June, 1883, upon a complaint charging her with keeping a disorderly house in Dallas, the defendant was acquitted on a trial before the mayor's court; that the testimony adduced on that trial was the same as that adduced on this trial; that it covered and embraced the whole period of time for and including the fourth day of April, 1883 (when she was convicted in the county court for keeping a disorderly house in Dallas), up to May 25, 1883, and that every act done by her in keeping the disorderly house during said period of time was proved on the trial in the mayor's court, and by the same witnesses who testified on this trial. *Held*, that whether or not the keeping of a house for public prostitution and as a common resort for prostitutes and vagabonds is an offense continuous in its nature, the plea of former acquittal, under the facts proved, should have prevailed. *Handley v. State*, 444.

2. Whether or not the keeping of a disorderly house is an offense continuous in its nature was not considered by the trial court as an issue in this case, but he treated the plea of former acquittal as unsupported by the evidence, because the penalty prescribed by the city ordinance was not as great as that prescribed by the statute; for which reason he instructed the jury, in substance, to disregard the plea. The record discloses no such ordinance, and the trial judge must have assumed its existence or held that it devolved upon the defense to prove it; in which there was error. *Id.*

3. Charge of the court properly instructed the jury that a former acquittal upon a charge of vagrancy cannot prevail as a plea in bar of a prosecution for keeping a disorderly house. *Wilson v. State*, 497.

4. Courts do not take judicial cognizance of special laws, and a

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**FORMER ACQUITTAL—continued.**

charge of the trial court, in assuming the existence of a city ordinance requiring all penal ordinances to be published ten days before their enforcement, was error. *Id.*

5. But if such an ordinance was shown to have existed, the defendant, in order to invoke its protection, would not be required to assume the burden of proving its publication. The presumption that it was legally published would obtain, and the burden of proving its non-publication would rest on the adverse party. In charging the converse of this rule the court erred. *Id.*

6. See evidence held sufficient to sustain the plea of former acquittal. *Id.*

**FORMER CONVICTION.**

See **FORMER ACQUITTAL.**

**JUDGMENT, 8.**

1. To a prosecution for illegal branding of cattle, the defendant, in addition to his plea of not guilty, interposed a special plea of a former conviction for the same offense in the same court. This special plea was defective, in that it failed to set out the record of conviction, and did not specifically allege the identity of the person convicted and the offense of which he was convicted. These defects, however, were not excepted to at the trial, and the defendant was permitted, without objection, to introduce testimony in support of the plea. In support of the plea, the defendant proved that at the time and place that he marked and branded the animal involved in this prosecution, he also marked and branded another yearling, whose owner was unknown, for which last act he had been indicted, tried and convicted. This proof was made by oral testimony, and the record of conviction was not, as it should have been, read in evidence. To this, however, the State made no objection. *Held*, that, under the circumstances, the evidence must be considered, as it is brought up in the record. *Adams v. State*, 163.

2. It is well settled, in cases of theft, that the stealing of different articles of property, belonging to different persons, at the same time and place, so that the transaction is the same, is but one offense against the State, and the accused cannot be convicted on separate indictments charging different parts of one transaction, as if they were distinct offenses, as a conviction on one of the indictments bars a prosecution on the other. *Held*, that the same rule applies to the offense of illegal marking and branding stock. *Id.*

3. When a defendant interposes the plea of *autrefois acquit* or *convict*, the burden of proving the identity of himself as the party formerly acquitted or convicted and the identity of the offense, is upon him; and the State can under no circumstances be required to establish the contrary. *Kain v. State*, 282.

4. Proof of identity of the offense is not made by proof that the offense of which the defendant has been acquitted or convicted, and that for which he is on trial, are identical in nature, name and designation; but it must be made by showing the identity of the very acts or

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**FORMER CONVICTION—continued.**

omissions which constituted the offense—that the acts which constituted the offense for which the former acquittal or conviction was had are the very acts which constitute the offense on trial. *Id.*

5. It has been stated as a rule that “the burden of proving a prior conviction of the offense charged against a defendant being upon him, it is not shifted by *prima facie* evidence of the identity of the offense of which he has been previously convicted with that charged upon him.” This rule, without modification, does not hold good in this State; for if the evidence makes a *prima facie* case in support of the plea, it must preponderate in its favor, and a preponderance of proof will suffice to support the plea. *Id.*

6. In opposition to the plea of former conviction in this case, it is urged by the State that, it being shown that the information in this case was pending in the county court at the time that a similar complaint was filed in the mayor’s court (a court clothed with concurrent jurisdiction), even though the proof were sufficient to establish the identity of the offense, the plea could not prevail, inasmuch as, under the circumstances, the mayor’s court could not have acquired legal jurisdiction. *Held*, that the position is not tenable, and that, if the proof was sufficient to establish that the offense tried by the mayor’s court was identical with the offense being tried by the county court, the plea of former conviction would prevail in bar of a prosecution in the county court. *Id.*

7. See evidence *held* insufficient to support special pleas of former acquittal, former conviction and privilege. *Id.*

8. A dismissal of a prosecution before jeopardy has attached, without a trial upon the merits and a judgment of acquittal or conviction, is not a bar to another prosecution for the same offense. *Porter, ex parte*, 821.

9. It is expressly provided by statute (Code Crim. Proc., Art. 281) that a discharge by a magistrate upon an examination of any person accused of an offense shall not prevent a second arrest of the same person for the same offense. The same rule applies in case of a commitment. *Id.*

10. Special pleas of former acquittal and conviction are provided for by statute (Code Crim. Proc., Arts., 523 and 524), and are the only pleas of *res adjudicata* recognized in criminal proceedings, except in the case of judgment upon *habeas corpus*. *Id.*

11. When a person accused of an offense has been discharged under *habeas corpus* proceedings, he cannot be detained in custody upon the same charge until after he shall have been indicted therefor. *Id.*

12. The applicant was committed in default of bail by a justice of the peace to await the action of the grand jury on a charge against him of theft of a horse. The grand jury, by mistake, returned an indictment against him for the theft of a saddle, which mistake was not discovered until after the discharge of the grand jury. The district attorney moved the court to hold the applicant over until the next meeting of the grand jury, which motion the court refused. Thereupon a second prosecution for the theft of a horse was instituted before a justice of the peace, who, sitting as an examining court, again com-

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FORMER CONVICTION—*continued.*

mitted the applicant, in default of bail, to await the action of the next grand jury. Applicant then applied to the district judge for a writ of *habeas corpus*, which was awarded, but, upon the hearing, the applicant was remanded to custody in default of bail. No trial upon the merits was had upon the *habeas corpus*, the applicant admitting the existence of probable cause for believing that he was guilty; but he demanded his discharge upon the ground that the second prosecution before the justice was barred by the previous one, and that the subject matter was *res adjudicata* as to any examining court, and he could no longer be detained to answer said charge except under an indictment by the grand jury. *Held*, 1. That, upon the failure of the grand jury to present an indictment against him for horse theft, at the term succeeding his commitment, the applicant was entitled to his discharge, and a dismissal of that prosecution, no good cause to the contrary, supported by affidavit, being shown to the court. 2. The doctrines of *res adjudicata* and jeopardy do not apply to proceedings before examining courts; and the second prosecution and proceedings in the examining courts were warranted by law. *Id.*

13. A person is in legal jeopardy only when he has been placed upon trial before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and when a jury has been charged with his deliverance. *Id.*

14. Autrefois convict, to be considered as a plea, must allege the proceedings which resulted in such former conviction, *i. e.*, matter of record, to wit, the former indictment and conviction; and matters of fact, to wit, the identity of the person convicted, and of the offense of which he was convicted. See *Williams v. The State*, 18 Texas Court of Appeals, 285, for the rule as stated, which is a correction of the rule as laid down in *Troy v. The State*, 10 Texas Court of Appeals, 819. *Heffner v. State*, 573.

## FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY.

1. To constitute the offense denounced by Article 797 of the Penal Code, the property upon which the lien was given must have been "personal or movable property" at the time the lien was executed. The sale or other disposition of real property on which the owner had executed a written lien is no offense against the laws of this State. *Hardeman v. State*, 1.

2. Movable property is such as attends the person of the owner wherever he goes, in contradistinction to things immovable. Under this rule it is *held* that a growing crop is immovable property. *Id.*

## G

## GAMING.

1. The exhibition of a gaming table, for the purpose of obtaining betters, which is the gist of the offense, is not an offense continuous in its nature, within the meaning of the law. *Kain v. State*, 282.

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**GAMING—continued.**

2. The information in this case charges the appellant with *keeping* the gaming table as well as *exhibiting* the gaming table. The verdict and judgment fail to show for which (the keeping or the exhibiting of the same) the appellant was convicted, and it is therefore urged by appellant that he is relieved from the burden of proving the identity of the offense. *Held*, that the proposition is untenable; that, though it be conceded that the keeping of a gaming table is an offense continuous in its nature, the exhibition of a gaming table is not; and, to be available, the evidence in support of the plea of former acquittal or conviction must meet the whole case, and is not sufficient if it leaves it in doubt whether the former conviction was had for the keeping or the exhibition of the table. *Id.*

3. Indictment for playing cards in a public place must allege the facts constituting the place a public place, unless the place alleged be one of those enumerated in the Penal Code. Allegation that the game was played "in a public place, to-wit, in the room back of the Gilt Edge saloon," is not sufficient. *Jackson v. State*, 373; *Bowman v. State*, 513.

4. Indictment, to charge the offense of playing cards in a public place, must allege the facts which constitute the place of playing a public place, unless the place be one specifically enumerated in the Penal Code. Livery stables are not so enumerated, and it does not suffice to aver that the livery stable was a public place, without alleging facts which constitute it such a place. *Fossett v. State*, 375.

5. Article 355 of the Penal Code enumerates the public houses in which it is made penal to play at a game of cards. Article 356 prescribes the circumstances under which a room in a house may come within the prohibition of the laws, to-wit: "Any room attached to such public house and commonly used for gaming. A private room of an inn or tavern is not within the meaning of public places, unless such room is commonly used for gaming," etc. It follows that when a room of a house is designated as the place of playing, the indictment, to charge the offense of playing cards in a public place, must allege that the room is attached to some one of the public houses named in the statute. *Weiss v. State*, 431.

**H.****HABEAS CORPUS.**

1. Habeas corpus may be invoked to escape the enforcement of a void conviction. But where a convicted defendant appeals, and he and his sureties obligate themselves to abide the judgment on appeal, they are bound by the obligation, whether the conviction was void or valid. *Martin et al. v. State*, 265.

2. The applicant was committed in default of bail by a justice of the peace to await the action of the grand jury on a charge against him of theft of a horse. The grand jury, by mistake, returned an indictment against him for the theft of a saddle, which mistake was not discovered until after the discharge of the grand jury. The district attorney moved the court to hold the applicant over until the next meeting of the grand



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**HABEAS CORPUS—continued.**

jury, which motion the court refused. Thereupon the second prosecution for the theft of a horse was instituted before a justice of the peace, who, sitting as an examining court, again committed the applicant, in default of bail, to await the action of the next grand jury. Applicant then applied to the district judge for a writ of *habeas corpus*, which was awarded, but, upon the hearing, the applicant was remanded to custody in default of bail. No trial upon the merits was had upon the *habeas corpus*, the applicant admitting the existence of probable cause for believing that he was guilty; but he demanded his discharge upon the ground that the second prosecution before the justice was barred by the previous one, and that the subject matter was *res adjudicata* as to any examining court, and he could no longer be detained to answer said charge except under an indictment by the grand jury. *Held*, 1. That, upon the failure of the grand jury to present an indictment against him for horse theft, at the term succeeding his commitment, the applicant was entitled to his discharge, and a dismissal of *that* prosecution, no good cause to the contrary, supported by affidavit, being shown to the court. 2. The doctrines of *res adjudicata* and jeopardy do not apply to proceedings before examining courts; and the second prosecution and proceedings in the examining courts were warranted by law. *Porter ex parte*, 321.

3. Special pleas of former acquittal and conviction are provided for by statute (Code Crim. Proc., Arts. 523 and 524), and are the only pleas of *res adjudicata* recognized in criminal proceedings, except in the case of judgment upon *habeas corpus*. *Id.*

4. When a person accused of an offense has been discharged under *habeas corpus* proceedings, he cannot be detained in custody upon the same charge until after he shall have been indicted therefor. *Id.*

5. Statements of facts, in *habeas corpus* cases, must be made up and certified by the trial judge in the same manner as in other criminal cases. Not even in *habeas corpus* cases can a statement of facts approved after the expiration of ten days allowed by the order of court be considered for any purpose. *Barber, ex parte*, 369.

6. *Habeas corpus* is available to a defendant whose constitutional right to a trial in due course of law is withheld from him an unreasonable length of time. *Rutherford v. State*, 649.

**HEARSAY EVIDENCE.**

*See EVIDENCE*, 83.

**MURDER, 2.**

1. The question as propounded called for and elicited hearsay testimony, but, in view of the fact that K. and R. testified as witnesses in the case, and stated in their testimony that they told the witness of whom the question was asked precisely what the said witness testified they told him, the admission of the answer to the said question is *held* not to be such error as to warrant the reversal of the conviction. *Ashlock v. State*, 18.

2. The defense in a trial for assault to murder proposed to prove by

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**HEARSAY EVIDENCE—continued.**

a witness that an officer, a short time before the shooting, directed one of the parties shot to take the other party from a saloon to his home because he was intoxicated. *Held*, that such evidence was clearly hearsay and irrelevant, and was properly excluded. *Hobbs v. State*, 517.

3. A medical witness, having expressed his opinion as to the cause of the death of the deceased, was permitted, over the objection of the defendant, to testify that other physicians in attendance at the *post mortem* examination concurred with his opinion. *Held*, that the evidence was clearly hearsay and inadmissible; but, in view of the fact that the other physicians were subsequently introduced as witnesses and testified in person to the same effect, the error was immaterial. *Morgan v. State*, 593.

**HOMICIDE.**

See MURDER, 18.

1. Homicide is the destruction of the life of one human being by the act, agency, procurement or culpable omission of another. *Treadwell v. State*, 560.

2. See the opinion of Judge Hurt for subdivisions twelve and thirteen of the charge of the trial court upon the subject of homicide, respecting the question whether or not the death of the deceased was the result of the original injury inflicted by the defendant, or whether it was the result of subsequent neglect and manifestly improper treatment of other persons, which charges are *held*, by a majority of the court, to embody the common law rule upon the subject, and to be inapplicable in this State, because the same has been changed, modified and ameliorated by statute. See, on the subject, the several opinions of Judges Hurt and Willson, and Presiding Judge White. *Morgan v. State*, 593.

3. The term "homicide" is more specifically defined by the statutes of this State than by the common law. Our Code defines homicide to be the destruction of the life of one human being, by the act, agency, procurement or culpable omission of another. Such destruction of life must be *complete*, and complete by the act, agency, procurement or omission of the defendant. *Id.*

4. Article 547 of the Penal Code reads as follows: "The destruction of life must be complete by such act, agency, procurement or omission; but although the injury which caused death might not, under other circumstances, have proved fatal, yet, if such injury be the cause of death, without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is homicide." Construing the words "but although the injury which caused death might not, under other circumstances, have proved fatal," the majority of the court hold that they refer to all injuries which, under the circumstances of the particular case, may not be necessarily fatal, but may cause death, and not to such injuries as must, inevitably, cause death. Otherwise stated: If the injury be such that death is not a certain result—if it be such that human aid and skill may prevent its fatal termination—then it is such an injury as comes within

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**HOMICIDE—continued.**

the meaning of the words quoted. But if the injury be such that no human aid or skill could prevent its fatal termination, then the injury is not such as comes within the meaning of the words. For an exposition of the principle, see the opinion of Judge Willson. *Id.*

5. Article 547 of the Penal Code, in effect, provides that an injury which, though not necessarily fatal in itself nevertheless terminates in death, when death might have been averted by timely aid and treatment, is homicide by the act of the person inflicting it, unless it appears that there had been gross neglect or manifestly improper treatment of the person injured by some other person than he who inflicted the original injury. Herein consists the important change made by the statute in the common law rule. At common law, the neglect or improper treatment must produce the death in order to exonerate the person who inflicted the original injury. Under the statute it is not necessary that the neglect or improper treatment shall contribute in any degree to the death, but if there be gross neglect or manifestly improper treatment, either in preventing or in aiding the fatal effects of the injury, the death of the injured person is not homicide by the party who inflicted the original injury. *Id.*

6. "Gross neglect and improper treatment," as construed by the majority of the court, are held to mean, not only such as produce the destruction of human life, but as well such as allow, suffer or permit the destruction of life. This construction is fortified by Article 548 of the Penal Code, which concludes as follows: "If the person inflicting the injury which makes it necessary to call aid in preserving the life of the injured person shall wilfully fail or neglect to call such aid, he shall be deemed equally guilty as if the injury were one which would immediately lead to death." See the opinion of Willson, judge, for an elaboration of the principle. *Id.*

## 1.

**ILLEGAL BRANDING.**

1. To a prosecution for illegal branding of cattle, the defendant, in addition to his plea of not guilty, interposed a special plea of a former conviction for the same offense in the same court. This special plea was defective, in that it failed to set out the record of conviction, and did not specifically allege the identity of the person convicted and the offense of which he was convicted. These defects, however, were not excepted to at the trial, and the defendant was permitted, without objection, to introduce testimony in support of the plea. In support of the plea, the defendant proved that at the time and place that he marked and branded the animal involved in this prosecution, he also marked and branded another yearling, whose owner was unknown, for which last act he had been indicted, tried and convicted. This proof was made by oral testimony, and the record of conviction was not, as it should have been, read in evidence. To this, however, the State made no objection. *Held*, that, under the circumstances, the evidence must be considered, as it is brought up in the record. *Adams v. State*, 102.

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 ILLEGAL BRANDING—*continued*.

2. It is well settled in cases of theft, that the stealing of different articles of property, belonging to different persons, at the same time and place, so that the transaction is the same, is but one offense against the State, and the accused cannot be convicted on separate indictments charging different parts of one transaction, as if they were distinct offenses, as a conviction on one of the indictments bars a prosecution on the other. *Held*, that the same rule applies to the offense of illegal marking and branding stock. *Id.*

8. With respect to the question involved, the concluding part of the charge of the court instructed the jury, in effect, if the marking and branding of one of the animals was done, perfected and completed by one act and transaction, and, after such completion, the other animal, if it belonged to a different owner, was, by a different act, marked and branded, it would be a different transaction and offense, although the branding and marking may have been done near the same time and place. *Held*, error, in view of the rule announced and the evidence in this case. *Id.*

4. Upon the same issue, the defendant requested the court to charge the jury as follows: "If you believe, from the evidence in this case, that the animal charged to be illegally marked and branded, in this case, was marked and branded at the same time and place as the animal charged to have been illegally marked and branded in the indictment in case No. 622, on which indictment the defendant has been tried and convicted, so as to make the marking and branding of the two animals one and the same transaction, or part of the same transaction, then, if the jury so believe, they will find the special plea of defendant true." *Held*, that the requested charge embodied the correct rule upon the subject, and its rejection was error. *Id.*

## INDICTMENT.

See DECREPIT PERSON.

INFORMATION.

JURISDICTION, 4, 5.

ROBBERY, 1.

EVIDENCE, 60.

INTENT, 2.

PRACTICE, 27.

SCIRE FACIAS, 12.

1. Repugnancy in an indictment arises when it contains an allegation which is directly contradicted by other statements in the indictment. See the opinion in this case in illustration. *Hardeman v. State*, 1.

2. If the property sold or otherwise disposed of while subject to an existing written lien be personal though not movable property, the sale or disposition of it brings the offense within the meaning of Article 797 of the Penal Code. But, to be sufficient to charge the offense, the indictment must allege that the property was personal property. *Id.*

8. An ungathered crop still appendant to the ground can, under no circumstances, be held movable property, and cannot partake of the character of personal property until ready for harvest. *Id.*

4. The indictment charged in substance that, having executed a valid mortgage lien in writing upon "eighteen acres of cotton, then and there being movable property," the defendant subsequently sold the

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**INDICTMENT—continued.**

same with intent to defraud his mortgagee. *Held*, insufficient to charge any offense against the laws of this State. *Id.*

5. The indictment charged that the defendant, on July 30, 1883, in the Creek Nation, Indian Territory, did fraudulently take, steal and carry away from the possession of one B., three horses, the personal property of said B., without his consent, etc. That, on August 1, 1883, the said defendant did bring the said horses into the county of G., State of Texas. That on the said thirtieth day of July, 1883, the said acts of defendant constituted the offense of theft of horses, and were punishable as such, under and by virtue of the laws of the said Creek Nation, then in full force. *Held*, that the indictment was sufficient to charge the offense of horse theft, wherefore the motion in arrest of judgment was properly overruled. *Cowell v. State*, 57.

6. Indictment for theft described the stolen property as "one twenty dollar gold piece of the value of twenty dollars, current money of the United States, and one five dollar bill in money of the value of five dollars, and one pocket knife of the value of fifty cents, of the corporeal personal property of J. W. McKnight." The motion in arrest of judgment alleged the insufficiency of the description of the alleged stolen property. *Held*, sufficient, under Article 732 of the Code of Criminal Procedure, which declares "money" to be "property," and under Article 427 of the same Code, which provides that, "when it becomes necessary to describe property of any kind in an indictment, a general description of the same by name, kind, quality, number and ownership, if known, shall be sufficient." The motion in arrest of judgment was properly overruled. *Bryant v. State*, 144.

7. Indictment for the sale of liquors on election day which fails to charge that the election was held in the precinct, village, town or city of the defendant, or to charge where the liquor was sold, is insufficient to charge the offense denounced by Article 178 of the Penal Code. *Zweifel v. State*, 154.

8. There must be some particularity, or what the law calls certainty, in an indictment. The particular act of which the State complains must be set forth in plain and intelligible words, so that the party who is accused may know what he is called upon to answer, and may be able to prepare for his defense. The indictment in this case charges the defendant with wilfully disturbing a congregation assembled for religious worship, but fails to allege the means or manner by which he disturbed the congregation. *Held*, that the indictment is bad, for uncertainty, wherefore the motion to quash the same should have been sustained. *Thompson v. State*, 159.

9. While in charging the offense of disturbing religious worship it is necessary that the means or manner of disturbance be alleged, it is not essential that the indictment enter into details. A general statement, as that it was effected by loud talking, swearing, whistling, etc., as the case might be, is sufficient. *Id.*

10. The statute in force when the case of *Kindred v. The State*, 83 Texas, 67, was decided, in which an indictment similar to this was held

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**INDICTMENT—continued.**

sufficient, and the statute now in force (Penal Code, Article 280), are materially different, and the Kindred case is no longer authority upon the question. *Id.*

11. It is permissible in some cases, where the offense charged is predicated upon an instrument in writing, to set forth the substance and effect, or purpose of the instrument, without declaring upon it by its tenor or in *hac verba*, as, for instance, in perjury. But, as a general rule, whenever an instrument in writing enters into an offense as a part or basis thereof, or where its proper construction is material, the instrument itself, *hac verba*, should be set out in the indictment. The offense of libel is included in the latter class of cases, and an indictment for that offense, to be sufficient, must profess, upon its face, to set forth an accurate copy of the alleged libel in words and figures; otherwise, it is bad on motion to quash, or in arrest of judgment. *Coulson v. State*, 190.

12. After alleging the writing and circulation of the instrument, the indictment avers that the said statement so made was then and there a libel, etc., and, "in substance, words and figures as follows, to wit," etc. Then follows the instrument in quotation marks, and the indictment concludes as follows: "The grand jurors, upon their oath, do say that the foregoing is the language and substance and meaning of said false and malicious statement, as near as they can give," etc. *Held*, that notwithstanding the writing appears to be set out in *hac verba*, the concluding part of the indictment, *i. e.*, "the foregoing is the language and substance and meaning of said false and malicious statement as near as they can give," etc., manifests the fact that the grand jury only attempted the substance and meaning as near as they could, and not the literal language of the alleged libel, which alone was sufficient. *Id.*

13. The laws of this State do not recognize, as an exception to the general rule that the libelous matter must be set forth *hac verba*, the omission of the literal language of the libel when it is indecently obscene. If it be such as to invite the jurisdiction of the courts of this State, however obscene, it must be properly pleaded. *Id.*

14. The writing of a letter and the deposit of it in the post office for transmission to the party addressed constitute the publication of a libel within the meaning of the law, provided such letter be of such character that, if made public, it would affect the reputation of the party about whom it was written. *Id.*

15. The distinction between libel at common law and libel as defined by our statute is, that libel at common law is punishable because of its tendency to provoke a breach of the peace, while under our statute it is punishable as well because of its tendency to injure the reputation of a person. Such being the case, if this intent is averred, the indictment is sufficient, without the additional averment of the tendency and intent to provoke a breach of the peace. *Id.*

16. Indictment charges the appellant in this case with an assault with intent to murder one A. The charge of the court authorized the jury

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**INDICTMENT—continued.**

to convict in case they believed from the evidence that he committed such assault upon either A. or M. *Held*, error, because under no state of proof could the jury be authorized to convict for an assault on M. under an indictment charging the assault to have been committed upon A. *Brown v. State*, 197.

17. The indictment in this case charges as follows: "That J. H. Brown & C. C. Brown, J. A. True & J. H. True, late of the county of Young, on the fifteenth day of January, in the year of Our Lord one thousand eight hundred and eighty-three, with force and arms, in the county of Young, and State of Texas, did then and there wilfully injure and deface the school house known as the Flat Rock school house, said house being then and there a public school house, and was then and there held by said Young county as a public school house; against the peace and dignity of the State." *Held*, that the sign "&," as used between the two words "Brown," and the two words "True," is synonymous with the conjunctive word "and," and sufficient to the validity of an indictment, though the use of the written word "and" is the better practice. *Brown v. State*, 245.

18. "Public buildings," as used in Article 417 of the Penal Code, are declared by Article 418 of the same Code to mean the "Capitol, and all other buildings in the Capitol grounds, at the seat of government, including the General Land Office and the Executive Mansion, the various State Asylums, and all buildings belonging to either; all college or university buildings erected by the State; all court houses and jails, and all other buildings held for public use by any department or branch of government, State, county or municipal; and the specific enumeration of the above shall not exclude other buildings not named, properly coming within the meaning and description of a public building." *Held*, that the indictment in this case is insufficient, inasmuch as where it is attempted to charge the injury or defacement of any other public building than those specifically enumerated in said Article 418 of the Penal Code, the indictment must allege that such building was a "public building," and was "held for public use." A private building might be a "public school house," and not within the purview of the statute. *Id.*

19. Irregularities in the record entry of the presentment of an indictment do not constitute cause for setting aside the indictment, or in arrest of judgment. Such matters should be mooted by suggestion *in limine* to the court wherein the indictment was presented, and are not available in a different forum to which the venue has been changed. *Barr v. State*, 838.

20. The Legislature had no constitutional authority to prohibit the gift of intoxicating liquors, nor to empower localities to do so by means of the local option law; wherefore an indictment charging a mere gift of liquor is insufficient to charge any offense. *Stallworth v. State*, 345.

21. Even when a sham gift but a real sale of the intoxicating liquor is charged as the gravamen of the offense, to be sufficient, the indictment must charge that the gift was made "with the purpose of evading the law." *Id.*

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INDICTMENT—*continued.*

22. Indictment for playing cards in a public place must allege the facts constituting the place a public place, unless the place alleged be one of those enumerated in the Penal Code. Allegation that the game was played "in a public place, to-wit, in the room back of the Gilt Edge saloon," is not sufficient. *Jackson v. State*, 373; *Bowman v. State*, 513.

22. Indictment, to charge the offense of playing cards in a public place, must allege the facts which constitute the place of playing a public place, unless the place be one specifically enumerated in the Penal Code. Livery stables are not so enumerated, and it does not suffice to aver that the livery stable was a public place, without alleging facts which constitute it such a place. *Fossett v. State*, 375.

23. A conviction cannot stand in this court when the transcript fails to bring up an indictment or information. *Harwood v. State*, 416.

24. Article 355 of the Penal Code enumerates the public houses in which it is made penal to play at a game of cards. Article 356 prescribes the circumstances under which a room in a house may come within the prohibition of the laws, to-wit: "Any room attached to such public house and commonly used for gaming. A private room of an inn or tavern is not within the meaning of public places, unless such room is commonly used for gaming," etc. It follows that when a room of a house is designated as the place of playing, the indictment, to charge the offense of playing cards in a public place, must allege that the room is attached to some one of the public houses named in the statute. *Weiss v. State*, 481.

25. See the opinion *in extenso* for an indictment for burglary held sufficient to charge the offense. *Ross v. State*, 554.

26. Indictments in two cases charged that defendant "did wilfully and unlawfully keep a disorderly house, to wit: A house kept as a common resort for prostitutes." The Penal Code of this State, Article 339, defines a disorderly house as "one kept for the purpose of public prostitution, or as a common resort for prostitutes and vagabonds." Exception was that the indictments were bad because they failed to allege that the house was kept as a common resort for both "prostitutes and vagabonds." *Held*, that to be sufficient, the indictments should have so charged; wherefore, the trial court erred in overruling the exception. *Springer v. State*, 591.

27. Indictment for burglary, to be sufficient, must describe with all its statutory ingredients, the felony or theft intended to be committed. In charging the entry with intent to take the property therein being, the indictment in this case was insufficient, because it failed to charge that such intended theft was "without the consent of the owner," an element of theft necessary to be alleged and proved in order to support a conviction. *Treadwell v. State*, 643.



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## INFORMATION.

*See* AGGRAVATED ASSAULT, 2.

## INDICTMENT.

1. Information to charge the offense of swindling must allege that some false representation as to existing facts or past events was made by the accused. Mere false promises or false professions of intention, though acted upon, are not sufficient. The information in this case charged, substantially, that defendant promised to pay one B. fifty cents for four certain fish, if said B. would deliver the same at his, defendant's, house; that B. did so deliver the fish, and that the said representations of the defendant were then and there false, etc. *Held*, that the information was insufficient to charge swindling or any other offense. *Allen v. State*, 150.

2. See the statement of the case for a complaint *held* sufficient to charge the offense of wilfully killing a horse with intent to injure the owner; wherefore a motion to quash the same was properly overruled. *Lane v. State*, 172.

3. See the statement of the case for a newspaper article made the subject matter of a prosecution for libel, and *held* libelous *per se*; and for an information *held* sufficient to charge the circulation of a libel with intent to injure the reputation of the person libelled. *Woody v. State*, 252.

4. The date of the offense is alleged in the complaint as "one thousand eight hundred eight four." In the information it is set out as "March 30, 1884." *Held*, that the complaint alleges an impossible date, and that the motion to quash the information upon the ground of fatal variance should have prevailed. *Heffner v. State*, 573.

## INTENT.

*See* ASSAULT WITH INTENT TO RAPE.

ASSAULT WITH INTENT TO MURDER.

THEFT, 8, 20.

1. In every assault there must be an intent to injure coupled with an act which must at least be the beginning of the attempt to injure at once, and not a mere act of preparation for some contemplated injury that may afterwards be inflicted. See evidence *held* to be insufficient to support a conviction for aggravated assault, because insufficient to prove an assault. *Fondren v. State*, 48.

2. To constitute theft there must be an intent on the part of the person taking the property, at the time of the taking, to deprive the owner of the property of the value of the same, and to appropriate it to the use and benefit of the person taking. The word "it" has been properly held to refer to the antecedent word "property." In this case the indictment charges the intent as follows: "With the fraudulent intent to deprive the said Elisha Davis of the value of same, and to appropriate the value of the same"—using the word "value" instead of the word "it." *Held*, that the indictment is in substantial compliance with Article 420 of the Code of Criminal Procedure, and is therefore sufficient. *Thompson v. State*, 74.

3. Upon the question of intent, the court charged as follows: "The

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**INTENT—continued.**

intent to injure the owner is the gist of this offense, but such intent may be presumed from the fact of the killing." Again: "If you find that defendant killed the horse mentioned in the complaint, you may, from that fact, presume that such killing was done with intent to injure the owner, if, from all the facts and circumstances of the case, it is, in your judgment, proper for you to do so." *Held*, correct, in view of the provision in Article 679 of the Revised Penal Code, which has, with reference to this offense, changed and reversed the previous rule on the subject, and authorized the presumption of intent from the perpetration of the act. *Lane v. State*, 172.

**J.****JEOPARDY.**

1. A person is in legal jeopardy only when he has been placed upon trial before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and when a jury has been charged with his deliverance. *Porter, ex parte*, 821.

2. A dismissal of a prosecution before jeopardy has attached, without a trial upon the merits and a judgment of acquittal or conviction, is not a bar to another prosecution for the same offense. *Id.*

3. It is expressly provided by statute (Code Crim. Proc., Art. 281) that a discharge by a magistrate upon an examination of any person accused of an offense shall not prevent a second arrest of the same person for the same offense. The same rule applies in case of a commitment. *Id.*

4. The doctrines of jeopardy and *res adjudicata* do not apply to proceedings in examining courts. *Id.*

**JUDGMENT.**

1. A trial court has the authority to amend a judgment after the expiration of the term at which it was rendered, in order to correct clerical errors or mistakes, or to add an omitted clause necessary to give it effect, when there is anything in the judgment by which to amend. Under this rule, as laid down in this State and supported by elementary authority, the trial court, in a proceeding on a forfeited appeal bond, was authorized to amend the judgment *nisi* by inserting the omitted words, "the judgment will be made final unless good cause be shown at the next term of the court why the defendant did not appear." *Collins v. State*, 274.

2. Articles 1354 and 1355 of the Revised Statutes require that notice be given to the parties interested in a judgment or decree before any correction of mistakes or misrecitals in the judgment can be made by amendment. Judgment *nisi* is the foundation of *scire facias* proceedings on a forfeited bail bond. To that judgment the principal in the bail bond is a direct party in interest, and, by reason thereof, becomes a necessary party to a proceeding to amend the judgment *nisi*, even though he was not made a party in the *scire facias*. *Id.*

3. It is no objection to an indictment that it charges both burglary

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JUDGMENT—*continued.*

and theft, but a conviction cannot be had for both offenses when thus charged in the same indictment, and a separate punishment assessed for each, or a joint punishment assessed for both. The correct doctrine has been thus stated: "If both (burglary and theft) are charged in one indictment, it is clear that the theft would be included in the burglary, and that no judgment could be rendered for the theft; and, in such a case, the conviction for burglary would be a bar to a subsequent prosecution for theft." *Miller v. State*, 417.

4. Judgment final upon a forfeited bail bond can be valid only when predicated upon a valid judgment *nisi*, which, to be valid, must state that it will be made final unless good cause be shown at the next term of the court why the defendant did not appear. *Watkins v. State*, 648.

5. Final judgment based upon an invalid judgment *nisi* is fundamentally erroneous, and will be set aside by this court, whether or not the insufficiency of the judgment *nisi* is assigned as error. *Id.*

6. Judgment *nisi* is fatally defective if it fails to state that the same will be made final unless good cause be shown at the next term of the court why the defendant did not appear. *Pickett v. State*, 648.

## JUDICIAL COGNIZANCE.

1. Courts do not take judicial cognizance of special laws, and a charge of the trial court, in assuming the existence of a city ordinance requiring all penal ordinances to be published ten days before their enforcement, was error. *Wilson v. State*, 497.

2. But if such an ordinance was shown to have existed, the defendant, in order to invoke its protection, would not be required to assume the burden of proving its publication. The presumption that it was legally published would obtain, and the burden of proving its non-publication would rest on the adverse party. In charging the converse of this rule the court erred. *Id.*

## JURISDICTION.

*See VENUE.*

1. Jurisdiction over misdemeanor cases is conferred by the Constitution upon the county and justices' courts. The district courts can supercede the county courts in such jurisdiction only when so empowered in the manner prescribed in Article 5, section 22, of the Constitution. The act of March 16, 1883 (Laws of Eighteenth Legislature, page 24), divested the county court of Atascosa county of jurisdiction over criminal cases, and vested in the district court of said county exclusive jurisdiction over criminal cases then pending in said county court. *Held*, that, in this manner the said district court was constitutionally invested with jurisdiction over misdemeanor cases. *Chapman v. State*, 76.

2. The act of the Legislature referred to proceeds as follows: "And the district court shall have and exercise all the civil and criminal jurisdiction heretofore vested in said county court by the Constitution and laws, and *not* divested by this act." *Held*, that under the recognized

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JURISDICTION—*continued.*

rule of statutory construction, that "when the intention of a statute is plainly discernible from its provisions, that intention is as obligatory as the letter of the statute, and will even prevail over the strict letter," the word "not," as used in the act, which would otherwise defeat the plain intent of the statute, must be held to have been used by mistake, and should be disregarded in construing the said statute. *Id.*

3. The jurisdiction conferred by the act under consideration upon the district court, is the same divested out of the county court, as to all cases not then pending in said county court; that is, the jurisdiction as to cases not pending is not exclusive, but only concurrent with the justices' courts in cases over which the justices' courts have heretofore had jurisdiction. Succinctly stated, the act referred to does not, in any way, affect the jurisdiction of the justices of the peace of Atascosa county. *Id.*

4. By the act of January 22, 1875, Crockett county was created out of a portion of Bexar county. By the act of February 10, 1875, it was attached to Kinney county for judicial purposes. No further legislation was had concerning Crockett county until the adoption of the Revised Statutes, when it was embraced in the twentieth judicial district, but was not attached to any county for judicial purposes. By the act of April 28, 1882, it was again attached to Kinney county for judicial purposes, and again so attached by the act of April 9, 1883. It appears never to have been attached, for judicial purposes, to any county other than Kinney, and never to have been organized. Section 8 of the final title of the Revised Statutes provides as follows: "All civil statutes of a general nature, in force when the Revised Statutes take effect, and which are not included herein, or which are not hereby expressly continued in force, are hereby repealed." *Held*, that the effect of the section quoted was to repeal the act of February 10, 1875, which was a statute of a general nature. *Held*, further, that in divesting Kinney county of jurisdiction over Crockett county, the effect of the repealing statute was to restore the jurisdiction of Bexar county, where it remained until the passage of the act of April 28, 1882, when it was again conferred upon Kinney. *Weller v. State*, 200.

5. Indictment was presented in the district court of Kinney county September 19, 1882, when Kinney county had jurisdiction over Crockett county, but it charged that the offense was committed in Crockett county on March 30, 1882, at which time Crockett county was under the jurisdiction of Bexar county. It does not appear, however, that Bexar county ever exercised or attempted to exercise jurisdiction over the case. Under the well settled rule that when the place where an offense is committed is, after the commission of the offense, created into a new county, such new county has jurisdiction over the offense, it is *held* that Crockett county, having been attached to Kinney county for judicial purposes, the indictment, laying the venue of the offense in the unorganized county of Crockett, was properly presented in Kinney county, which county had jurisdiction to try and determine the case. *Id.*

6. In opposition to the plea of former conviction in this case, it is

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## JURISDICTION—continued.

urged by the State that, it being shown that the information in this case was pending in the county court at the time that a similar complaint was filed in the mayor's court (a court clothed with concurrent jurisdiction), even though the proof were sufficient to establish the identity of the offense, the plea could not prevail, inasmuch as, under the circumstances, the mayor's court could not have acquired legal jurisdiction. *Held*, that the position is not tenable, and that, if the proof was sufficient to establish that the offense tried by the mayor's court was identical with the offense being tried by the county court, the plea of former conviction would prevail in bar of a prosecution in the county court. See the opinion on the question. *Kain v. State*, 282.

7. This offense was committed in the unorganized county of Z., when that county was by law attached to M. county for judicial purposes. The indictment was properly found in M. county. Subsequently Z. county was attached to F. county for judicial purposes, and the district court of M. county transferred the indictment to the said F. county. Before the case came on for trial in F. county, Z. county was partially organized, but its judicial autonomy was not completed, the Legislature having failed to provide times for holding the terms of the district court, and the district judge having failed to fix the same under the authority delegated to him by the act of April 25, 1882. When the case was called in F. county the defendant interposed his plea to the jurisdiction of the district court of that county, and insisted that the case should be transferred to Z. county. *Held*, that the plea was properly overruled. *Barr v. State*, 333.

8. Under the charter of the city of Dallas, the mayor's court of that city has concurrent jurisdiction with the county court over the offense of keeping a disorderly house. *Handley v. State*, 444.

9. A prosecution for embezzlement may be maintained in the county in which the accused took or received the property embezzled, or through or into which he may have undertaken to transport it. *Reed v. State*, 536.

## JURY LAW.

1. When, upon his *voir dire*, a proposed juror answers that there is established in his mind as to the guilt or innocence of the defendant a conclusion that will influence his verdict, he should be peremptorily discharged. Such an answer is not only a ground of challenge for cause, but is an absolute disqualification. *Spear v. State*, 98.

2. The mode and manner by which public roads are established is prescribed by statute. (Revised Statutes, Articles 4389 to 4396, inclusive.) One of the prerequisites is that the jurors appointed to lay out the road shall, before proceeding to act as such, take the oath prescribed by statute. (Revised Statutes, Article 4396.) *Davidson v. State*, 336.

3. The rule is well established that, in order to condemn private property to public uses, the law authorizing and directing it must be strictly observed and pursued, and the performance of what the law requires is a condition precedent to the authority to condemn. A public road cannot be laid out and established without the requirements of the law in such cases having first been complied with. *Id.*

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JURY LAW—*continued*.

4. Where proceedings are summary, and a court proposes to exercise extraordinary power, under a special statute prescribing its course, that course must be exactly observed. The statutory oath, which is a necessary prerequisite to the validity of the action of a jury in laying out a public road, was never taken by the jury in this case. Wherefore see the statement of the case for a requested charge on the subject which the trial court erroneously refused to give. *Id.*

5. The mere separation of a jury pending verdict is not cause for new trial. In addition to the separation in contravention of law, it must be further made to appear that by reason of such separation probable injustice to the accused has been occasioned. See the opinion *in extenso* for facts of the separation of a jury *held* not to have prejudiced the rights of the defendant, and therefore insufficient cause for new trial. *Ogle v. State*, 861.

6. A proposed juror is absolutely disqualified by answering that he has formed such an opinion of the defendant's guilt or innocence as would influence him in finding a verdict. It is only when he answers the qualifying question in the negative that he is required to be examined by the court as to how far his conclusions, however formed, will influence his action. *Rockhold v. State*, 577.

## L.

## LEADING QUESTIONS.

1. Leading questions are such as plainly suggest to the witness the answers sought to be elicited by the interrogator. "Did K. and R. tell you the day they saw the man in D.?" was not a leading question. *Ashlock v. State*, 18.

2. Defendant's counsel, on cross-examination, asked the prosecuting witness, W.: "Did you or not ever receive an order from defendant on W. G. Cheney to pay your firm claim against him?" The court, on objection, ruled out the question as asked, and held that its proper form was: "Did you ever receive any order from the defendant before the prosecution was commenced?" *Held*, correct. *Cole v. State*, 461.

## LIBEL.

1. It is permissible in some cases, where the offense charged is predicated upon an instrument in writing, to set forth the substance and effect, or purpose of the instrument, without declaring upon it by its tenor or in *hæc verba*, as, for instance, in perjury. But, as a general rule, whenever an instrument in writing enters into an offense as a part or basis thereof, or where its proper construction is material, the instrument itself, *hæc verba*, should be set out in the indictment. The offense of libel is included in the latter class of cases, and an indictment for that offense, to be sufficient, must profess, upon its face, to set forth an accurate copy of the alleged libel in words and figures; otherwise, it is bad on motion to quash, or in arrest of judgment. *Coulson v. State*, 190.

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LIBEL—*continued*.

2. After alleging the writing and circulation of the instrument, the indictment avers that the said statement so made was then and there a libel, etc., and, "in substance, words and figures as follows, to wit," etc. Then follows the instrument in quotation marks, and the indictment concludes as follows: "The grand jurors, upon their oath, do say that the foregoing is the language and substance and meaning of said false and malicious statement, as near as they can give," etc. *Held*, that notwithstanding the writing appears to be set out in *hæc verba*, the concluding part of the indictment, *i. e.*, "the foregoing is the language and substance and meaning of said false and malicious statement as near as they can give," etc., manifests the fact that the grand jury only attempted the substance and meaning as near as they could, and not the literal language of the alleged libel, which alone was sufficient. *Id.*

3. The laws of this State do not recognize, as an exception to the general rule that the libelous matter must be set forth *hæc verba*, the omission of the literal language of the libel when it is indecently obscene. If it be such as to invite the jurisdiction of the courts of this State, however obscene, it must be properly pleaded. *Id.*

4. The writing of a letter and the deposit of it in the post office for transmission to the party addressed constitute the publication of a libel within the meaning of the law, provided such letter be of such character that, if made public, it would affect the reputation of the party about whom it was written. *Id.*

5. The distinction between libel at common law and libel as defined by our statute is, that libel at common law is punishable because of its tendency to provoke a breach of the peace, while under our statute it is punishable as well because of its tendency to injure the reputation of a person. Such being the case, if this intent is averred, the indictment is sufficient, without the additional averment of the tendency and intent to provoke a breach of the peace. *Id.*

6. See the statement of the case for a newspaper article made the subject of the prosecution for libel, and held libelous *per se*, and for an information held sufficient to charge the circulation of a libel with intent to injure the reputation of the person libeled. *Wood v. State*, 252.

7. See evidence held sufficient to support a conviction for circulating a libel. *Id.*

## LIQUOR DEALERS.

See LOCAL OPTION LAW.

UNLAWFUL SALE OF LIQUOR.

## LOCAL OPTION LAW.

1. Since the appeal in this case was perfected, the voters of the precinct in which, at the time of the trial, the "Local Option" law was in force, have determined against prohibition, and such fact has been proclaimed in the manner prescribed by law. Under such circumstances the judgment must be reversed and the prosecution dismissed, because there

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LOCAL OPTION LAW—*continued*.

is no longer any law in force by authority of which the judgment can be enforced. *Mulkey v. State*, 53.

2. The Legislature had no constitutional authority to prohibit the gift of intoxicating liquors, nor to empower localities to do so by means of the local option law; wherefore an indictment charging a mere gift of liquor is insufficient to charge any offense. *Stallworth v. State*, 345.

3. Even when a sham gift but a real sale of the intoxicating liquor is charged as the gravamen of the offense, to be sufficient, the indictment must charge that the gift was made "with the purpose of evading the law." *Id.*

4. Upon questions arising upon the admission of evidence, see *Boone's case*, 10 Texas Court of Appeals, 418; *Prutcher's case* 12 *Id.*, 401; *Atkin's case*, 14 *Id.*, 148. *Id.*

## LOST PAPERS.

See SUBSTITUTION OF LOST PAPERS.

## M.

## MALICIOUS MISCHIEF.

See the statement of the case for a complaint *held* sufficient to charge the offense of wilfully killing a horse with intent to injure the owner; wherefore a motion to quash the same was properly overruled. *Lane v. State*, 172.

## MANSLAUGHTER.

See HOMICIDE.

MALICE.

MURDER.

SELF-DEFENSE.

1. Objection that the court erred in omitting to charge the law of manslaughter was first made in the motion for new trial. The rule under such circumstances is, that this court will not interfere unless such omission appears calculated to result to the prejudice of the defendant. *Escareno v. State*, 85.

2. The Mexican term "cabron," meaning that the person to whom it is applied consents to the prostitution of his wife, was claimed by the defendant to have been applied to him by the deceased, and upon that ground it is urged that, being an insult to his wife, the homicide could not be murder, but manslaughter, and that the omission of the court to so charge the jury was error. It was proved that some one of several parties present used the word "cabron," but it was not proved that it was the deceased who used it. *Held*, that this evidence was insufficient to disclose prejudice to the defendant in the omission to charge the law of manslaughter. Note, also, that the motion for new trial sets up evidence which clearly discloses that the insulting word was not the moving cause of the homicide. *Id.*

3. Accomplice under our Code is the same as an accessory before the fact.



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**MANSLAUGHTER—continued.**

at common law. As at common law there could be no accessories before the fact to manslaughter, so under our Code there can be no accomplice to manslaughter. But at common law there might be a principal in the second degree to manslaughter, and under our Code the offense of manslaughter admits of principals. Hence the court erred in charging the jury that "the law of principals does not apply to cases of manslaughter," but the error being in favor of the accused, it is not revisable by this court. *Ogle v. State*, 361.

4. It was proper to permit the State to prove that a few minutes after the deceased and his brother were shot, the defendant and another man were seen at the house of the deceased's father, and also to prove the language and conduct of the defendant at that time and place. The said testimony related to matters which transpired immediately after the shooting, and were closely connected with the shooting, and therefore they were part of the *res gesta*. *Cartwright v. State*, 473.

5. The law of principals in crime applies as well to manslaughter as to any other offense. Though there can be no accomplice in manslaughter, several persons may so act together as to become principals in its commission. It is not, therefore, error to instruct the jury that the defendant might be convicted of manslaughter, although he did not himself inflict the mortal wound. *Id.*

6. Upon the subject of self-defense, which was clearly presented by the evidence, the court charged as follows: "The jury are further charged, that if the killing was done in the necessary defense of the slayer, or any of them; that is, to protect himself or themselves from immediate and imminent danger of death or great bodily harm from the violence of the deceased, which was not provoked or sought for by the slayer, and which could not be avoided by any other means except retreating, then it would not be an unlawful killing, but would be justifiable homicide." *Held*, insufficient. In the first place, if the slayer is in immediate and imminent danger of death or serious bodily harm from the violence of the deceased, he is not required to resort to other means than killing his assailant to protect himself, but in such case he is justified in acting promptly and slaying his adversary at once. In the second place, the charge erroneously limits the right of self-defense to actual danger of death or serious bodily harm, whereas the true rule is that if appearances are such as to create in the mind of the slayer a reasonable apprehension of death or serious bodily harm, and he acts under the influence of this apprehension, he acts in self-defense, although there was in fact no danger of his being killed or receiving serious bodily injury. In the third place, the charge, in view of the evidence in this case, erroneously restricted the right of self-defense to defense against the violence of the deceased alone. *Id.*

**MISNOMER.**

The true name of the owner of the alleged stolen property was Sam. McCasland. The indictment alleged his name to be Sam. McCasling. He was shown to have been equally well known by both names. *Held*, that the variance was not material. *Bird v. State*, 528.

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**MOTIVE.**

*See* INDICTMENT.

**MALICE.**

1. In a trial for robbery, the prosecuting witness was asked, upon cross-examination, if he did not, just before the institution of the prosecution, have a conversation with the defendant regarding the latter's knowledge of an alleged incestuous intercourse between the witness and his niece. *Held*, admissible on the question of the *animus* of the witness, for which reason, as shown by the bill of exceptions, the question was propounded; and the trial court erred in refusing to require the witness to answer. *Trimble v. State*, 115.

2. The defendant was a watchman at a railroad freight depot, and in the night time fired upon and wounded two men passing near the depot. *Held*, that, as tending to throw light upon the question of motive in shooting, and as having a tendency to mitigate, if not to justify, the conduct of the defendant in shooting, he was entitled to prove that there had been a great deal of car breaking and stealing from the cars at the depot where he was on duty as guard. *Hobbs v. State*, 517.

**MOVABLE PROPERTY.**

1. Movable property is such as attends the person of the owner wherever he goes, in contradistinction to things immovable. Under this rule it is *held* that a growing crop is immovable property. *Hardeman v. State*, 1.

2. If the property sold or otherwise disposed of while subject to an existing written lien be personal though not movable property, the sale or disposition of it brings the offense within the meaning of Article 797 of the Penal Code. But, to be sufficient to charge the offense, the indictment must allege that the property was personal property. *Id*.

3. An ungathered crop still appendant to the ground can, under no circumstances, be held movable property, and cannot partake of the character of personal property until ready for harvest. *Id*.

4. The indictment charged in substance that, having executed a valid mortgage lien in writing upon "eighteen acres of cotton, then and there being movable property," the defendant subsequently sold the same with intent to defraud his mortgagee. *Held*, insufficient to charge any offense against the laws of this State. *Id*.

5. To constitute the offense denounced by Article 797 of the Penal Code, the property upon which the lien was given must have been "personal or movable property" at the time the lien was executed. The sale or other disposition of real property on which the owner had executed a written lien is no offense against the laws of this State. *Id*.

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**MURDER.**

*See* HOMICIDE.

MALICE.

MANSLAUGHTER.

SELF-DEFENSE.

1. Charge of the court, in a murder trial, instructed the jury as follows: "If you believe from the evidence that a man was killed, yet unless the evidence of his identity as being Nathan Wurmser satisfies you that it was Nathan Wurmser, you will acquit. In determining this identity you will consider the entire evidence, and the attendant circumstances." It is objected that this charge did not confine the jury to the evidence, but authorized them to look beyond it to attendant circumstances. *Held*, that the charge of the court is not to be so construed. *Spear v. State*, 98.

2. A witness for the State, in a trial of a murder case, was permitted, over objection, to testify that on the morning of the day on which the deceased was killed, he rode up to where the deceased was at work; that the deceased seemed agitated and excited and told him that he, deceased, was afraid of that Mexican, meaning the defendant; that this conversation occurred about two hours before the killing occurred, and that the defendant was in sight at the time, but not near enough to hear the said conversation between the witness and the deceased. *Held*, that in the admission of such evidence the trial court erred, inasmuch as it was clearly hearsay, and did not come within any of the exceptions to the general rule which rejects hearsay evidence. *Segura v. State*, 221.

3. As tending to show a motive for the defendant to kill the deceased, it was proper to admit in evidence an affidavit charging the defendant with an offense, made by the deceased a short time before her death, and upon which a prosecution was pending at the time of that event. *Robinson v. State*, 347.

4. It was error to permit a witness to state what the deceased told her about a third party beating her nearly to death, such evidence being hearsay, and no part of the *res gestæ*, and in no way connected with or bearing upon the issue of the defendant's guilt. It did not appear that what the deceased said was in explanation of her then sickness and was a part of the *res gestæ* of it. *Id.*

5. See the statement of the case for evidence *held* insufficient to support a conviction for murder in the first degree; wherefore a new trial should have been awarded. *Id.*

6. To warrant the conviction of two or more persons as principals in the same offense, the evidence must show such co operation or complicity between them as constituted them principals. *Washington v. State*, 370.

7. Appellant and one R. were separately indicted and tried as principals in the murder of the former's wife. At neither trial was there any evidence tending to show co-operation or complicity between them in the commission of the homicide, and yet, upon the same state of proof, each of them was convicted as a principal in the murder.

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MURDER—*continued.*

*Held*, that in this condition of affairs the two convictions are irreconcilably repugnant to each other, and in the present case the court below erred in refusing a new trial. *Id.*

8. In a murder trial, the court, upon request of the State, charged the jury as follows: "Every man has a right to protect his house from invasion and his family from insult, and, in so protecting them, he has a right to use such force as may be necessary to accomplish his end, after verbal remonstrance has failed; and in the use of such force he will not be considered an aggressor or violator of the law." *Held*, that, while correct in the abstract, this charge was error, in view of the evidence on the question; first, because the evidence shows that there was no invasion of the deceased's premises by the defendant and his associates, but that, on the contrary, they entered upon the premises by invitation of the deceased; and, second, because, having so instructed the jury, the court should have further instructed them that if deceased used greater force or more dangerous means than were necessary to effect the expulsion of the parties, he thereby became himself an aggressor, and was no longer entitled to the immunity which the law, up to that time, afforded him in the protection of his castle. *Turner v. State*, 878.

9. At the instance of the State, the court further instructed the jury as follows: "If you believe from the evidence that defendant and Britton Turner and Tom Stanley went to the house of deceased and cursed and swore and raised a disturbance in the yard of deceased, and were bid by deceased to leave, and refused to do so, then deceased had a right to use all necessary force to put them out of the yard, and if they resisted such force, they cannot justify such resistance on the grounds of self-defense." *Held*, correct in principle, but, in view of the evidence, insufficient in that it did not further charge, in substance, that if the deceased used more force than was necessary to expel the parties, and thereby became himself the aggressor, the law accorded to Stanley the right of defense to the extent of protecting himself against the excessive force used. Note the circumstances of this case, wherein it is *held* that if S., the party who inflicted the fatal blow, acted in self-defense, and was justifiable, the defendant would also be guiltless of the homicide. *Id.*

10. The charges recited were special charges given at the instance of the State, but were not excepted to by the defendant on the trial, nor did he ask additional instructions. They were, however, complained of by him in his motion for new trial. This motion also complained of the failure of the court to charge all the law of the case. *Held*, that the special charges, given in such manner, separate and distinct from the main charge and from each other, and without being accompanied by a further explanation of the law of the case, were calculated to mislead the jury, and materially to prejudice the rights of the defendant. *Id.*

11. Where the fact of unlawful killing is established, and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse or justify the act, then

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**MURDER—continued.**

the law implies malice, and the offense is murder in the second degree. See the opinion for a charge upon the subject *held* inconsistent with the rule announced, insofar as in explaining implied malice it omits the qualification that where a homicide is committed under "mitigating circumstances" malice is not implied, although the homicide may be neither excusable nor justifiable. Note the suggestion of this court on the subject. *Id.*; *Stanley v. State*, 392.

12. Upon the right of the deceased to repel an intrusion upon his home premises, the court charged the jury "that entering into a quarrel or an angry verbal altercation with the occupant of the home premises, against his consent, in the presence of his wife and children, if he has any, would be improper conduct in the sense here used." *Held*, error, as being a charge upon the weight of evidence. *Stanley v. State*, 392.

13. On the trial, the State proved, amongst other things, that another party, who was charged in a separate indictment with the same offense, told defendant that he would whip defendant if he did not stand up to what he had said; that the appellant did not want to go with the other parties separately indicted for this offense to the house of deceased; that defendant said he feared a difficulty if they went; that defendant *en route* expostulated against going, and that defendant was a man of peaceable disposition. In view of this and other evidence, the defense asked the following charges of the court: "If you believe from the evidence that John and Britton Turner, by threats or otherwise, exercised undue influence over the person of the defendant, sufficient to overcome the mind of an ordinary man, and thereby induced him to accompany them to the residence of the deceased, then he was excusable in being there." "If you believe from the evidence that the defendant was a mere trespasser upon the premises of the deceased, or was brought there by undue influence exercised over his mind by threats or otherwise from John and Britton Turner, sufficient to overcome the will of an ordinary mind, and that defendant used no insulting words or threatening gestures previous to the attack of the deceased, then the deceased was not justifiable in doing him serious bodily injury except in defense of himself and family." *Held*, that whilst the charges asked were not critically correct, nor based upon such facts as would bring the case within the letter of the statute which makes duress a complete defense for acts otherwise punishable, the charges were within the spirit of that statute, and, under the peculiar circumstances of this case, their refusal was error. *Id.*

14. See this case for evidence held insufficient to sustain a conviction for murder in the second degree. *Turner v. State*, 433.

15. See the opinion *in extenso* for facts *held* to constitute such custody as to exclude the confession of an unwarned defendant. Note also evidence *held* not admissible under the rule which admits the unwarned confessions of facts by the accused which, being found to be true, conduce to the establishment of his guilt. *Owens v. State*, 443.

16. The ruling in *Weller's case*, *ante*, page 200, to the effect that if, in connection with the confession, a fact confessed was found to be true, and such fact conduced to establish guilt, the main fact, as well as all

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MURDER—*continued.*

other facts, whether found true or not, are admissible, is approved. But see the opinion for evidence *held* not to come within the purview of the rule. *Id.*

17. See the statement of the case for evidence in a *habeas corpus* proceeding for bail under a charge of murder *held* insufficient to authorize the refusal of bail. *Pace, ex parte*, 541.

18. Homicide is the destruction of the life of one human being by the act, agency, procurement or culpable omission of another. See the statement of the case for evidence *held* insufficient to establish a homicide, and hence insufficient to support a conviction for murder in the second degree. *Treadwell v. State*, 560.

19. The difficulty which culminated in this homicide had its origin in trouble between a husband and wife, the wife, at the time of the homicide, being a guest of the deceased. Under the circumstances this court cannot hold improper the cross-examination of a witness for the defense that sought to disclose the relations existing between the defendant and the wife. *Rockhold v. State*, 577.

20. Charge of the court instructed the jury as follows: "Implied malice is an inference or conclusion of law upon certain facts found by the jury. Thus the law implies malice from the unlawful killing of a human being, unless the circumstances make it evident that the killing was either justifiable, or, if not justifiable, was so mitigated as to reduce the offense below murder in the second degree." *Held*, error; not because it shifts the burden of proof, but because it infringes upon the doctrine of reasonable doubt, and authorizes the jury to apply the doctrine in behalf of the State, to the extent that the evidence should show, beyond a reasonable doubt, the existence of such facts as would justify or mitigate the homicide, instead of authorizing the jury, as it should, to apply it in behalf of the defendant, to the extent that the evidence should, beyond a reasonable doubt, establish the existence of malice. *Morgan v. State*, 593.

21. Insofar as the rule announced in the case of *Sharp v. The State*, 6 Texas Court of Appeals, 650, is in conflict with the doctrine above announced, that case is overruled. *Id.*

22. It is urged by the State that inasmuch as the court charged the jury to acquit if they had a reasonable doubt of the defendant's guilt of murder in the second degree, the error in the charge quoted was immaterial. *Held*, that the two charges are in direct conflict, and as the defendant promptly excepted, his exception must be sustained. *Id.*

23. See the opinion of Judge Hurt for subdivisions twelve and thirteen of the charge of the trial court upon the subject of homicide, respecting the question whether or not the death of the deceased was the result of the original injury inflicted by the defendant, or whether it was the result of subsequent neglect and manifestly improper treatment of other persons, which charges are *held*, by a majority of the court, to embody the common law rule upon the subject, and to be inapplicable in this State, because the same has been changed, modified and ameliorated by statute. See, on the subject, the several opinions of Judges Hurt and Willson, and Presiding Judge White. *Id.*

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**MURDER—continued.**

24. The term "homicide" is more specifically defined by the statutes of this State than by the common law. Our Code defines homicide to be the destruction of the life of one human being, by the act, agency, procurement or culpable omission of another. Such destruction of life must be *complete*, and complete by the act, agency, procurement or omission of the defendant. *Id.*

25. Article 547 of the Penal Code reads as follows: "The destruction of life must be complete by such act, agency, procurement or omission; but although the injury which caused death might not, under other circumstances, have proved fatal, yet, if such injury be the cause of death, without its appearing that there has been any gross neglect or manifestly improper treatment of the person injured, it is homicide." Construing the words "but although the injury which caused death might not, under other circumstances, have proved fatal," the majority of the court hold that they refer to all injuries which, under the circumstances of the particular case, may not be necessarily fatal, but may cause death, and not to such injuries as must, inevitably, cause death. Otherwise stated: If the injury be such that death is not a certain result—if it be such that human aid and skill may prevent its fatal termination—then it is such an injury as comes within the meaning of the words quoted. But if the injury be such that no human aid or skill could prevent its fatal termination, then the injury is not such as comes within the meaning of the words. For an exposition of the principle, see the opinion of Judge Willson. *Id.*

26. Article 547 of the Penal Code, in effect, provides that an injury which, though not necessarily fatal in itself nevertheless terminates in death, when death might have been averted by timely aid and treatment, is homicide by the act of the person inflicting it, unless it appears that there had been gross neglect or manifestly improper treatment of the person injured by some other person than he who inflicted the original injury. Herein consists the important change made by the statute in the common law rule. At common law, the neglect or improper treatment must produce the death in order to exonerate the person who inflicted the original injury. Under the statute it is not necessary that the neglect or improper treatment shall contribute in any degree to the death, but if there be gross neglect or manifestly improper treatment, either in preventing or in aiding the fatal effects of the injury, the death of the injured person is not homicide by the party who inflicted the original injury. *Id.*

27. "Gross neglect and improper treatment," as construed by the majority of the court, are held to mean, not only such as produce the destruction of human life, but as well such as allow, suffer or permit the destruction of life. This construction is fortified by Article 548 of the Penal Code, which concludes as follows: "If the person inflicting the injury which makes it necessary to call aid in preserving the life of the injured person shall wilfully fail or neglect to call such aid, he shall be deemed equally guilty as if the injury were one which would immediately lead to death." See the opinion of Willson, judge, for an elaboration of the principle. *Id.*

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MURDER—*continued*.

28. The construction placed upon the statutes referred to would not operate to shield a defendant from all punishment for his criminal act, but an indictment for murder, as in this case, if supported by proper and sufficient evidence, would support a conviction for assault with intent to murder. See the statement of the case for evidence *held* to demand a charge upon the law of assault with intent to murder. *Id.*

## N.

## NEWLY DISCOVERED EVIDENCE.

See NEW TRIAL, 3, 9.

See the statement of the case for newly discovered evidence set up in motion for new trial, but *held* not to be of such character as would tend, if true, to justify, extenuate or mitigate the homicide; wherefore, the motion for new trial was properly overruled. *Escareno v. State*, 85.

## NEW TRIAL.

See CONTINUANCE.

1. See the statement of the case for newly discovered evidence set up in motion for new trial, but *held* not to be of such character as would tend, if true, to justify, extenuate or mitigate the homicide; wherefore the motion for new trial was properly overruled. *Escareno v. State*, 85.

2. See evidence *held* insufficient to establish guilt beyond a reasonable doubt, and newly discovered evidence of such character as to have authorized and required the award of a new trial. *Trimble v. State*, 115.

3. When it appears that the alleged newly discovered evidence, upon which a motion for new trial is predicated is not, in fact, newly discovered evidence, but was, or, by proper diligence, might have been known to the defendant at the time of his trial, the new trial is properly refused, so far as that ground was concerned. *Makinson v. State*, 133.

4. See evidence *held* sufficient to support a conviction for robbery. *Id.*

5. When the evidence is insufficient to support a conviction, a new trial should be awarded. *Saltillo v. State*, 249.

6. New trial should be granted in all cases where the verdict of conviction is unsupported by competent evidence. *Zellcoffer v. State*, 312.

7. The mere separation of a jury pending verdict is not cause for new trial. In addition to the separation in contravention of law, it must be further made to appear that by reason of such separation probable injustice to the accused has been occasioned. *Ogle v. State*, 361.

8. It is a rule of practice in this State that, even when an application for continuance lacks some of the statutory requirements, if the proposed evidence appears material and true, it should be considered and weighed in connection with the evidence adduced, on the motion for new trial. This rule must be held to apply equally to an application for a continuance which, like this for instance, is irregular and unauthorized. The evidence set forth in the application in this instance being clearly material and probably true, the same should have been considered on the motion for new trial. *Stanley v. State*, 392.



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NEW TRIAL—*continued.*

9. It is only when the proposed absent testimony upon which a motion for new trial is based is claimed to be newly discovered that the affidavit of the absent witness to the effect that he would testify as stated in the motion is necessary to the validity of the motion. In all other respects it is only when the State has taken issue with the defendant on the truth of the matters set forth in the motion for new trial that the trial judge is required or authorized to hear evidence by affidavit or otherwise. The affidavit of the absent witness, in this case, was not essential to the validity of the motion. *Id.*

10. Applications for attachments for absent witnesses are not subject to judicial discretion, as provided with regard to applications for continuance. The materiality and probable truth of the testimony expected to be secured from the witnesses named in the application for attachment are not to be determined, on the motion for new trial, in the light of the evidence adduced on the trial. *Roddy v. State*, 502.

11. A verdict cannot be impeached by the affidavit of a juror; hence it was not error to overrule a motion for new trial based upon the affidavit of a juror that the jury misconstrued the charge of the court. *Rockhold v. State*, 577.

## NOTICE.

See SUBSTITUTION OF LOST PAPERS.

## O.

## OBSTRUCTION OF PUBLIC ROADS.

1. The court charged the jury as follows: "If you believe from the evidence that the defendant obstructed the road charged to have been obstructed, in Guadalupe county, and that said road is a public road, and that in doing so an offense was committed, the law then presumes that the act was intentionally and wilfully done, and it rests with the defendant and devolves upon him to prove the accident or innocent intention." Another charge was as follows: "On the trial of a criminal action, when the facts have been proved which constitute the offense, it devolves upon the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission." *Held*, that both of these charges were erroneous. See the report of this case on former appeal, 14 Texas Court of Appeals, 67. *Drinkoeter v. State*, 72.

2. The mode and manner by which public roads are established is prescribed by statute. (Revised Statutes, Articles 4359 to 4390, inclusive.) One of the prerequisites is that the jurors appointed to lay out the road shall, before proceeding to act as such, take the oath prescribed by statute. (Revised Statutes, Article 4386.) *Davidson v. State*, 826.

3. The rule is well established that, in order to condemn private property to public uses, the law authorizing and directing it must be strictly observed and pursued, and the performance of what the law requires is a

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OBSTRUCTION OF PUBLIC ROADS—*continued*.

condition precedent to the authority to condemn. A public road cannot be laid out and established without the requirements of the law in such cases having first been complied with. *Id.*

4. Where proceedings are summary, and a court proposes to exercise extraordinary power, under a special statute prescribing its course, that course must be exactly observed. The statutory oath, which is a necessary prerequisite to the validity of the action of a jury in laying out a public road, was never taken by the jury in this case. Wherefore see the statement of the case for a requested charge on the subject which the trial court erroneously refused to give. *Id.*

5. See evidence *held* insufficient to support a conviction for obstructing a public road. *Id.*

6. Even in cases where the obstruction is placed upon the road proper, the evidence must show that the obstruction was wilful. *A fortiori*, when the obstruction is consequential—arises from an act which the accused had the legal right to do—the evidence must show that the act was wilfully done, and with a view to such indirect or consequential effects. *Schubert v. State*, 645.

7. When used in a penal statute, the term "wilful" means with evil intent, or legal malice, or without reasonable ground for believing the act to be lawful. *Id.*

## OCCUPATION.

See UNLAWFUL SALE OF LIQUOR.

## P

## PARTIES.

See JUDGMENT, 1, 2.

## PERJURY.

Article 746 of the Code of Criminal Procedure provides that "in trials for perjury no person shall be convicted except upon the testimony of two credible witnesses, or of one credible witness, corroborated strongly by other evidence, as to the falsity of the defendant's statement under oath, or upon his own confession in open court." The accused in this case not having confessed his guilt in open court, it was the imperative duty of the trial court to give in charge to the jury the substance of the above provision of the Code. *Gartman v. State*, 215.

## PERSONAL PROPERTY.

See FRAUDULENT DISPOSITION OF MORTGAGED PROPERTY.

INDICTMENT, 1, 4.

MOVABLE PROPERTY, 5.

## PLAYING CARDS.

See GAMING.

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## PLEADING.

See BAIL BOND, 8, 4.

INDICTMENT.

INFORMATION.

PRACTICE, 5,

SCIRE FACIAS, 6, 7.

1. Indictment for the sale of liquors on election day which fails to charge that the election was held in the precinct, village, town or city of the defendant, or to charge where the liquor was sold, is insufficient to charge the offense denounced by Article 178 of the Penal Code. *Zweifel v. State*, 154.

2. It is permissible in some cases, where the offense charged is predicated upon an instrument in writing, to set forth the substance and effect, or purpose of the instrument, without declaring upon it by its tenor or in *hæc verba*, as, for instance, in perjury. But, as a general rule, whenever an instrument in writing enters into an offense as a part or basis thereof, or where its proper construction is material, the instrument itself, *hæc verba*, should be set out in the indictment. The offense of libel is included in the latter class of cases, and an indictment for that offense, to be sufficient, must profess, upon its face, to set forth an accurate copy of the alleged libel in words and figures; otherwise, it is bad on motion to quash, or in arrest of judgment. *Coulson v. State*, 190.

3. After alleging the writing and circulation of the instrument, the indictment avers that the said statement so made was then and there a libel, etc., and, "in substance, words and figures as follows, to wit," etc. Then follows the instrument in quotation marks, and the indictment concludes as follows: "The grand jurors, upon their oath, do say that the foregoing is the language and substance and meaning of said false and malicious statement, as near as they can give," etc. *Held*, that notwithstanding the writing appears to be set out in *hæc verba*, the concluding part of the indictment, *i. e.*, "the foregoing is the language and substance and meaning of said false and malicious statement as near as they can give," etc., manifests the fact that the grand jury only attempted the substance and meaning as near as they could, and not the literal language of the alleged libel, which alone was sufficient. *Id.*

4. The laws of this State do not recognize, as an exception to the general rule that the libelous matter must be set forth *hæc verba*, the omission of the literal language of the libel when it is indecently obscene. If it be such as to invite the jurisdiction of the courts of this State, however obscene, it must be properly pleaded. *Id.*

5. The writing of a letter and the deposit of it in the postoffice for transmission to the party addressed constitute the publication of a libel within the meaning of the law, provided such letter be of such character that, if made public, it would affect the reputation of the party about whom it was written. *Id.*

6. The distinction between libel at common law and libel as defined by our statute is, that libel at common law is punishable because of its tendency to provoke a breach of the peace, while under our statute it is punishable as well because of its tendency to injure the reputation of a per-

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PLEADING—*continued.*

son. Such being the case, if this intent is averred, the indictment is sufficient, without the additional averment of the tendency and intent to provoke a breach of the peace. *Id.*

7. Unless the transcript on appeal discloses that a plea by or for the accused was entered, a conviction cannot stand. *Jackson v. State*, 373.

8. Autrefois convict, to be considered as a plea, must allege the proceedings which resulted in such former conviction, *i. e.* matter of record, to wit, the former indictment and conviction; and matters of fact, to wit, the identity of the person convicted, and of the offense of which he was convicted. See *Williams v. The State*, 18 Texas Court of Appeals, 285, for the rule as stated, which is a correction of the rule as laid down in *Troy v. The State*, 19 Texas Court of Appeals, 319. *Haffner v. State*, 573.

## POSSESSION OF RECENTLY STOLEN PROPERTY.

See CHARGE OF THE COURT, 26, 49.

PRACTICE, 24.

THEFT.

1. When relying upon the possession of recently stolen property, to convict, the State is required only to prove the falsity of the defendant's explanation made at the time his possession was challenged. The State cannot be required to disprove every conflicting explanation the defendant may make. *Ashlock v. State*, 18.

2. Where the State, in a theft case, relies upon the defendant's possession of recently stolen property as an inculpatory fact, the defendant is entitled to prove his explanation of his possession made at the time his possession was first challenged, and if such explanation be reasonable the *onus* of disproving it is imposed upon the State. In this case the defendant attempted to prove a conversation with a witness for the purpose of getting his explanation before the jury, but was not permitted to do so. But *held*, that, inasmuch as the bill of exceptions reserved to this ruling fails to disclose the conversation or its materiality, this court cannot revise the action of the court below in this matter. *Howell v. State*, 93.

3. The trial court charged the jury as follows: "Possession of property recently stolen is evidence against the accused, which, like all other evidence, is to be taken and considered by the jury in connection with other testimony in the case." *Held*, that exception to the charge was well taken, inasmuch as in charging upon this evidence, separate and apart from the other evidence in the case, the court gave to it undue prominence; and particularly was it error to charge positively that such evidence was *against* the defendant. *Bryant v. State*, 144.

4. The true rule on the subject is that "the possession of property recently stolen is merely a fact or circumstance to be considered by the jury in connection with all the other evidence submitted to them, in determining the guilt of the possessor." *Id.*

5. Nor is it always that the possession of recently stolen property is evidence *against* the possessor. It is always admissible evidence in a

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POSSESSION OF RECENTLY STOLEN PROPERTY—*continued*.

trial for theft, but it is for the jury and not the judge to say whether it is or is not against the defendant. Moreover, when it is evidence against the defendant, it is not of itself, unaided by other evidence, sufficient to support a conviction; and the court further erred in refusing to so charge, when requested. *Id.*

6. Circumstantial evidence being alone relied upon by the State, the court charged as follows: "In order to convict upon circumstantial evidence, the circumstances must be so connected as to exclude every reasonable hypothesis but the guilt of the defendant." Exception that the charge as given was not full and explicit enough to enable the jury to properly understand and apply the rule governing circumstantial evidence, was well taken, especially when shown that the principal State's witness was intoxicated at the time of the theft. *Id.*

## PRACTICE.

See ACCOMPLICE TESTIMONY, 1, 2.

ALTERATION.

AMENDMENT.

BILL OF EXCEPTIONS

BURDEN OF PROOF.

CHARGE OF COURT, 24, 25.

CIRCUMSTANTIAL EVIDENCE, 1, 2

CONTINUANCE.

DILIGENCE.

EVIDENCE, 35.

FORMER ACQUITTAL.

FORMER CONVICTION.

HABEAS CORPUS.

ILLEGAL BRANDING.

JUDICIAL COGNIZANCE.

1. Leading questions are such as plainly suggest to the witness the answers sought to be elicited by the interrogator. "Did K. and R. tell you the day they saw the man in D.?" was not a leading question. *Ashlock v. State*, 13.

2. Charges of the court are not tested by the strict rules applicable to indictments. All that is required of a charge is that it shall present the law of the case substantially and correctly, in a way that the jury will understand, and not be confused and misled by it. The objection urged to the charge in this case is that it does not instruct the jury that, in order to constitute theft, the taking of the animal must have been fraudulent. The charge, without using the statutory word "fraudulent" as descriptive of the taking, instructs the jury that if the defendant "took the mare with the fraudulent intent to appropriate her," etc. *Held*, sufficient. *Id.*

3. When relying upon the possession of recently stolen property to convict, the State is required only to prove the falsity of the defendant's explanation made at the time his possession was challenged. The State cannot be required to disprove every conflicting explanation the defendant may make. *Id.*

JUDGMENT.

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MANSLAUGHTER, 1, 2.

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PRACTICE IN COURT OF APPEALS

PRESUMPTIONS OF LAW.

RECOGNIZANCE, 3, 8.

SCIRE FACIAS.

SUBSTITUTION OF LOST PAPERS.

THEFT, 2.

THE RULE.

VERDICT.

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**PRACTICE—continued.**

4. S. was bailed to appear before a justice's court of C. county, upon a charge of wilfully burning a public bridge. Failing to make his appearance, forfeiture of the bond was taken, and judgment *nisi* was entered, and upon hearing was made final. From this judgment S. and his sureties appealed to the county court, the appeal bond being signed by all the parties against whom judgment was rendered in justice's court, and by three other parties as sureties on the appeal bond. Judgment in the county court was rendered against the same parties to the judgment in the justice's court, but no judgment was taken against the three parties who signed the appeal bond as sureties. The same parties to the appeal to the county court appeal from that court to this, with the same parties as sureties on their appeal bond to this court, who were sureties on their appeal bond to the county court. The State's motion to dismiss the appeal to this court is based upon the following grounds: 1. Because there is no final judgment in the county court from which this appeal will lie. 2. Because the sureties on the appeal bond to the county court were not disposed of by the judgment of the county court. 3, 4 and 5. Because the sureties on the appeal bond to this court, being parties to the suit, because of being sureties on the appeal bond to the county court, are not competent sureties to the appeal bond to this court; and hence the appeal bond to this court is without sureties. *Held*, that, in order to authorize this appeal, it was not necessary that the final judgment should have disposed of the sureties on the appeal bond from the justice's to the county court; that, no judgment having been rendered against the sureties on the appeal bond to the county court, they were competent sureties on the appeal bond to this court. *Short v. State*, 44.

5. The effect of a general denial is to put in issue all the material, issuable allegations of the plaintiff's petition. In a proceeding upon a forfeited bail bond, the citation serves the purpose of a petition, and a general denial pleaded to it puts in issue all the allegations constituting the State's cause of action, and casts upon the State the burden of proving such allegations. This being a *scire factas* case, and the general denial being pleaded, the trial court erred in holding that the case involved no question of fact. *Id.*

6. Right of trial by jury is, by section 15 of the Bill of Rights, declared to be inviolate. Any party to a civil suit is entitled to a trial by jury, upon complying with the requirements of law; while in criminal cases, save in specially excepted cases (Code of Criminal Procedure, Article 594), the only mode of trial upon an issue of fact is by jury. Proceedings in forfeited bail cases, after judgment *nisi* and the issuance of citation, are the same as in civil cases, except where otherwise provided by statute; and upon the question of trial by jury in such cases, the rules applicable to civil cases will apply. The appellants in this case having complied with the law entitling them to a jury, the court below erred in withholding the right. *Id.*

7. Proof that a witness resided beyond the limits of the State sufficiently established the predicate for the introduction in evidence of his written testimony, taken before an examining court. *Cowell v. State*, 57.

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**PRACTICE—continued.**

8. It was urged against the competency of the written testimony that it was not sent to the clerk of the district court, sealed up in an envelope, etc. *Held*, that the objection was untenable, in view of the fact that the writing was identified as the testimony of the witness by the magistrate who reduced it to writing, and was properly certified to by him at the time it was subscribed and sworn to by the witness. *Id.*

9. The State was properly permitted to prove that the words "Muscogee" and "Creek" signify the same thing, and that the "Muscogee Nation" is the same as the "Creek Nation." Such proof, however, was not necessary, inasmuch as it was a matter of which the court was authorized to take judicial notice. *Id.*

10. The trial court admitted in evidence the printed Code of Laws of the Muscogee Nation, and in this action it did not err, the book purporting to be published by authority of the said Nation, and being certified to be a true copy of the manuscript laws of that Nation, which certificate was authenticated by the signature of the Principal Chief of that Government, under the great seal thereof. *Id.*

11. Primarily the presumption of law is in favor of the regularity of all the proceedings in the case. The record fails to show affirmatively whether the defendant was or was not present when his motion for new trial was acted upon. *Held*, that under such circumstances, his presence at the time is presumed on appeal. *Escareno v. State*, 85.

12. In the assignment of errors it was shown that the defendant's right to be present when his motion for new trial was being acted upon was waived by his counsel. Under such circumstances, even though the record showed affirmatively that the defendant was not present, the presumption obtains that the waiver was authorized by the defendant, and the defendant is bound thereby, unless he shows affirmatively that he did not authorize the waiver. *Id.*

13. Under the Revised Code (Article 415, Code of Criminal Procedure), it is not required that the entry of the minutes of the court of the presentment of the indictment should show the offense charged. See the statement of the case for an entry of the presentment of an indictment which, being sufficient, no amendment of it was necessary. *Spegr v. State*, 98.

14. When, upon his *voir dire*, a proposed juror answers that there is established in his mind as to the guilt or innocence of the defendant a conclusion that will influence his verdict, he should be peremptorily discharged. Such an answer is not only a ground of challenge for cause, but is an absolute disqualification. *Id.*

15. See the opinion *in extenso* for remarks of State's counsel, in argument, *held* not to amount to an abuse of privilege. *Id.*

16. In the absence of proper bills of exception, this court will not revise the action of the court below in refusing a continuance, and in overruling a motion to change the venue. *Makinson v. State*, 133.

17. It is only in cases when the State relies solely upon circumstantial evidence to secure a conviction that the trial court is required to charge the principles of law governing circumstantial evidence. *Id.*

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**PRACTICE—continued.**

18. When it appears that the alleged newly discovered evidence upon which a motion for new trial is predicated is not, in fact, newly discovered evidence, but was, or, by proper diligence, might have been, known to the defendant at the time of his trial, the new trial is properly refused, so far as that ground was concerned. *Id.*

19. The record, on appeal, must show that the venue of the offense was established by evidence; otherwise a conviction cannot stand. *Gonzales v. State*, 152.

20. A State's witness was permitted, over objection, to state what the prosecuting witness told him about the alleged assault the day after it occurred; and, in testifying about blood spots he saw upon the floor, to state what the prosecuting witness said to him as to how they came there. *Held*, error, as being clearly hearsay, and no part of the *res gesta*, nor otherwise competent. *Id.*

21. The prosecuting witness having stated, on cross-examination, that she was induced by the county attorney to make complaint against the defendant in this case, it was proper to admit, on behalf of the State, evidence to rebut and contradict the witness as to such statement. *Id.*

22. Over objection, the State was permitted to read in evidence the defendant's application for an attachment for certain witnesses, in which application he stated facts which he expected to prove by the absent witnesses, and which facts constituted a different defense than that he urged on the trial. This application was sworn to by defendant when he was confined as a prisoner in jail, and he was not cautioned that it might be used against him. *Held*, that, under such circumstances, the application for attachment was erroneously admitted in evidence. *Adams v. State*, 162.

24. It is a well settled rule of practice that the charge of the court should submit the law affirmatively upon every legitimate phase in which the evidence might be considered by the jury, and upon all the issues raised by the proof. And when there is a doubt as to whether an issue is or is not directly made by the evidence, the better practice is to solve the doubt by charging the law with reference to it. But see a state of proof whereunder, in the absence of a requested charge, the omission of the court to charge the law applicable to the defendant's explanation of his possession of stolen property before it was questioned was not reversible error. *Kennada v. State*, 258.

25. Omission to charge the law of circumstantial evidence, when the State relies alone upon that character of evidence, is fatal error. *Id.*

26. Under an indictment for theft, D. was convicted of swindling. Appealing to this court with appellants as sureties, he obligated himself, in his bond, to appear before the district court and abide the decision of his appeal. The conviction was affirmed on appeal, and D. failing to appear on his bond before the district court, the same was forfeited, and proper process to show cause, etc., was served on appellants. Appellants answered *scire facias* by general denial only, pleading none of the exonerating provisions of Article 452 of the Code of Criminal Procedure. The trial re-



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**PRACTICE—continued.**

sulted in final judgment against appellants. On the trial, the State read in evidence the indictment against D. for theft, and, over objection, the judgment of conviction for swindling. The objection is, that the conviction was not supported by the indictment, but was for a different offense, wherefore the judgment was a nullity, and inadmissible in evidence. *Held*, that it was only necessary for the State to show the recognizance and the judgment *nisi* declaring its forfeiture; that, while the judgment and indictment were not necessary evidence, their admission could in no way affect the issue in the case. *Martin et al. v. State*, 265.

27. The sufficiency of an indictment, or the regularity of the proceedings preliminary to the conviction of an offense charged by the indictment, cannot be questioned in a *scire facias* proceeding. In this case, the judgment of the Court of Appeals, affirming the judgment of conviction, was the law of the case, and could not be questioned in the court below. Nor can sureties on an appearance bond be heard in any way to question the guilt of their principal. *Id.*

28. Article 452 of the Code of Criminal Procedure prescribes the only causes which will exonerate principal and sureties from liability upon the forfeiture of a bail bond, and none of them reach to the sufficiency of the indictment or the validity of the conviction. *Id.*

29. The evidence may sometimes warrant the trial court to charge the jury on the assumption that a witness is an accomplice, but it is safer practice to submit that question to the jury, with clear instructions as to what constitutes an accomplice under Article 741 of the Code of Criminal Procedure. *Zollicoffer v. State*, 312.

30. Whether or not it is well supported in reason, the rule that suspends all proceedings in the trial court after appeal has been perfected, must be held to prohibit the trial court from amending the record pending appeal, and to the same extent operates to prohibit the substitution of any part of the record after appeal. This rule is not commended by this court, but is upheld on the principle of *stare decisis*. *Turner v. State*, 318.

31. After the appeal in this case was perfected the record in the trial court, except the judgment of conviction, the amended motion for new trial, the judgment overruling the same, and the appellant's recognizance, was destroyed by fire. At the next term of the court the county attorney, over objection, was permitted to substitute the complaint and information. Thereupon the defendant was permitted to substitute the other portions of the record, consisting of the statement of facts, bills of exception, charge of the court, assignment of errors, etc. *Held*, that such substituted papers, under the rule announced, cannot be considered by this court. *Id.*

32. Instead of confining his testimony to a statement of facts, a State's witness persisted in stating his suspicions and conclusions as to defendant's guilt. The defense objected, and requested that the examination of the witness by State's counsel be so confined as to elicit direct answers. The court refused to regulate the examination of the witness, but instructed him to confine

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## PRACTICE—continued.

his statements to facts in answer to questions propounded, and further directed the jury to disregard such statements of the witness as were merely suspicions, conclusions and opinions. Notwithstanding such instructions, the witness still persisted in injecting into his testimony statements which were not evidence, and were well calculated to prejudice the defendant. *Held*, that the court should have punished the recusancy of the witness as contempt of court by fine, or, if necessary, imprisonment. *Held*, further, that in view of the unsatisfactory nature of the inculpatory evidence, a new trial should have been awarded. *Harrison v. State*, 325.

83. Bill of exceptions, to be entitled to consideration, must have been presented to the trial judge for allowance and signature during the trial term, and within ten days after the conclusion of the trial. A trial is "concluded" by the judgment overruling a motion for new trial, or in the event that no such motion, and no motion in arrest of judgment is made, the conclusion of the trial is when the verdict of the jury has been received. *Id.*

84. Irregularities in the record entry of the presentment of an indictment do not constitute cause for setting aside the indictment, or in arrest of judgment. Such matters should be mooted by suggestion *en l'ine* to the court wherein the indictment was presented, and are not available in a different forum to which the venue has been changed. *Barr v. State*, 838.

85. In this case the trial court of its own motion entered up an order granting ten days after adjournment for the preparation of a statement of facts. Such statement of facts was prepared within the ten days and presented to the judge for his approval. It was, however, disapproved by him, and he prepared no statement himself in lieu thereof. This action of the court is alone relied upon for reversal. *Held*, that, as the appellant was not in default, the error necessitates the reversal of the judgment. *Johnson v. State*, 869.

86. Continuance is properly refused in the first instance when the application fails to allege that the applicant has no reasonable expectation of being able to secure the attendance of the absent witnesses during the term of the court by a postponement of the trial to a future day thereof. *Beatey v. State*, 421.

87. Note in the opinion the animadversion of this court upon a gross breach of decorum by the bystanders, and a palpable abuse of the privilege of argument by counsel, and upon the failure of the court to reprimand the same, and to admonish the jury in regard thereto. *Gartwright v. State*, 474.

88. In order to bind a party to a written contract, it is not necessary that his signature should appear at the end of it. If he writes his name in any part of the agreement, it may be taken as his signature, provided it was there written for the purpose of giving authenticity to the instrument, and thus operating as a signature. In holding the appeal bond from the justice's court defective because the appellant signed his name in the middle instead of at the end, the county court erred. *Taylor v. State*, 514.

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**PRACTICE—continued.**

39. The county court erred in dismissing the appeal from the justice's court because it appeared that the bond had not been approved by the justice. The rule is: "The statute requiring the justice to approve the bond taken by him from a party held to appear in the district court, etc., is directory, and the bond is not a nullity because the magistrate neglects to endorse his approval on it. The approval may be inferred from his return of the bond to the district court." *Id.*

40. A proposed juror is absolutely disqualified by answering that he has formed such an opinion of the defendant's guilt or innocence as would influence him in finding a verdict. It is only when he answers the qualifying question in the negative that he is required to be examined by the court as to how far his conclusions, however formed, will influence his action. *Rockhold v. State*, 577.

41. A medical witness, having expressed his opinion as to the cause of the death of the deceased, was permitted, over the objection of the defendant, to testify that other physicians in attendance at the *post mortem* examination concurred with his opinion. *Held*, that the evidence was clearly hearsay and inadmissible; but, in view of the fact that the other physicians were subsequently introduced as witnesses and testified in person to the same effect, the error was immaterial. *Morgan v. State*, 593.

42. If the trial court in criminal cases has any power to substitute lost papers, other than the indictment or information, that power is derived either from Article 1475 of the Revised Statutes, or the inherent authority of the court to supply its own records when lost or destroyed. When supplied under the provisions of the statute, three days notice to the adverse party is expressly required; and when supplied under the inherent power of the court reasonable notice is required upon general principles. *Gillespie v. State*, 641.

43. *Quære* whether an indictment can be substituted before trial. *Schultz v. The State*, 15 Texas Court of Appeals, 258, referred to on this question. *Id.*

44. When the evidence adduced on a trial for murder tends to raise the issue of manslaughter, it is the duty of the trial judge to charge the law of that offense, regardless of his own opinion as to whether or not such evidence will justify a conviction for manslaughter. *Rutherford v. State*, 649.

45. *Habeas corpus* is available to a defendant whose constitutional right to a trial in due course of law is withheld from him an unreasonable length of time. *Id.*

**PRACTICE IN THE COURT OF APPEALS.**

*See* BILL OF EXCEPTIONS.

PRACTICE.

STATEMENT OF FACTS.

TRANSCRIPT.

1. In previous decisions of this court the doctrine has been advanced that convictions would not be set aside because of errors or omissions in

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**PRACTICE IN THE COURT OF APPEALS—continued.**

the charge not sought to be corrected by exception or special charge, nor by being made ground of motion for new trial, unless the error was fundamental. Such doctrine, however, is not altogether correct. The true rule in such state of case is this: If there was a material misdirection of law as applicable to the case, or a failure to give in charge to the jury the law which was required by the evidence in the case, and such error or omission was calculated, under all the circumstances of the case, to prejudice the rights of the defendant, this court should, for either cause, reverse the judgment. *Elam v. State*, 34.

2. Even when it is apparent that prosecuting counsel assumed and commented, in argument, upon a fact not in proof, this court will not, for that reason alone, reverse a conviction, unless it is made clearly to appear that such conduct was calculated to prejudice the rights of the defendant. *Bass v. State*, 62.

3. In the absence of a proper statement of facts the only duty of this court is to determine whether the indictment is sufficient to sustain the charge of the court and the judgment of conviction; and a statement of facts filed after the adjournment of court, in the absence of an order of court, embodied in the record, showing that such filing was authorized, cannot be considered by this court for any purpose whatever. *Thompson v. State*, 74.

4. In the absence of a statement of facts, this court will inquire no further than to ascertain whether or not the indictment was sufficient to charge the offense and sustain the charge of the court and the verdict of the jury, except as to matters so presented by bills of exception as to be determinable without a statement of facts or where it appears that the conviction was not had by due course of law. *Brown v. State*, 197.

5. The rule stated does not preclude this court from revising the charge of the court, in a felony case, when such charge is not warranted by the indictment, and when, under any state of evidence, it would be manifestly erroneous, and may have prejudiced the rights of the accused. *Id.*

6. Statement of facts filed after the adjournment of court, unless such filing is shown by the transcript to have been authorized by the court, will not be considered by this court for any purpose. *Brown v. State*, 245.

7. Unless the record shows that a plea was entered by or for the defendant, this court will set aside the conviction. *Jackson v. State*, 363.

8. The liability of the court to mislead the jury and prejudice the rights of the accused by extending the charge beyond the issues involved in the trial, is the reason of the rule. When, then, the defendant has excepted to such a charge, and doubt arises as to how far the defendant may have been prejudiced by it, the duty of reversing the judgment is imposed upon this court. To defeat the enforcement of this rule, it must manifestly appear that the charge, though wrong, did not influence the verdict of the jury. *Goode v. State*, 411.

9. A conviction cannot stand in this court when the transcript fails to bring up an indictment or information. *Harwood v. State*, 416.

10. While the overruling of an application for a continuance is not, *per*

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PRACTICE IN THE COURT OF APPEALS—*continued.*

*se*, the subject of revision by this court, yet the application should be taken into consideration by the court below in passing upon the defendant's motion for new trial, and will be considered by this court in revising the action of the court below in refusing a new trial. See the statement of the case for evidence set up in a motion for new trial, which, considered in the light of the evidence adduced, demanded the award of a new trial. *Beatey v. State*, 421.

11. The rule stated, however, is not ordinarily applicable to a case wherein it appears that the desired testimony was supplied from other sources, and that no injury resulted to the defendant by the action of the court in refusing the continuance. *Id.*

12. The prosecuting attorney in this case transcended the limit of legitimate argument in closing for the State, but was promptly reprimanded by the court, and the jury fully instructed to disregard his utterances so far as they were unauthorized. In the light of all the circumstances surrounding the case, the defendant's rights do not appear to have been prejudiced by the abuse of privilege. *Held*, that, under such circumstances, the conviction will not be disturbed. *Sutton v. State*, 490.

13. Appeal lies to this court from a judgment of the county court, dismissing an appeal from a justice's court, when the amount of the judgment was for more than twenty dollars; wherefore the motion to dismiss this appeal is overruled. *Taylor v. State*, 514.

14. Final judgment based upon an invalid judgment *nisi* is fundamentally erroneous, and will be set aside by the court, whether or not the insufficiency of the judgment *nisi* is assigned as error. *Watkins v. State*, 646.

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PRESENTMENT OF INDICTMENT.

Under the Revised Code (Article 415, Code of Criminal Procedure), it is not required that the entry on the minutes of the court of the presentment of the indictment should show the offense charged. See the statement of the case for an entry of the presentment of an indictment which, being sufficient, no amendment of it was necessary. *Spear v. State*, 98.

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PRESUMPTION OF INNOCENCE.

The court charged the jury as follows: "If you believe from the evidence that the defendant obstructed the road charged to have been obstructed, in Guadalupe county, and that said road is a public road, and that in doing so an offense was committed, the law then presumes that the act was intentionally and wilfully done, and it rests with the defendant and devolves upon him to prove the accident or innocent intention." Another charge was as follows: "On the trial of a criminal action, when the facts have been proved which constitute the offense, it devolves upon the accused to establish the facts or circumstances on which he relies to excuse or justify the prohibited act or omission." *Held*, that both of these charges were erroneous. See the report of this case on former appeal, 14 Texas Court of Appeals, 67. *Drinkoester v. State*, 72.

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## PRESUMPTION OF LAW.

*See* APPEAL BOND, 2.

INTENT, 8.

JUDICIAL COGNIZANCE, 1.

RECOGNIZANCE, 5.

SCIRE FACIAS, 19.

1. The validity of the conviction is assailed upon the ground that the verdict was not translated into the language of the defendant, who is a Mexican. In the absence of a bill of exceptions presenting such fact, this court cannot proceed upon the assumption that everything stated in the motion for new trial is true, when the record is silent on the subject. *Escareno v. State*, 85.

2. Primarily the presumption of law is in favor of the regularity of all the proceedings in the case. The record fails to show affirmatively whether the defendant was or was not present when his motion for new trial was acted upon. *Held*, that under such circumstances, his presence at the time is presumed on appeal. *Id.*

3. The Legislature having conferred upon the mayor's court of the city of Dallas jurisdiction over the offense of keeping disorderly houses, concurrent with the county court, the presumption obtains, until the contrary is shown, that the city ordinances have conformed the penalty to that of the State. *Handley v. State*, 444.

## PRINCIPAL AND ACCESSORY.

1. Charge of the court presented the following instructions to the jury: "In considering the guilt or innocence of the defendant on trial, the jury are instructed that no act on the part of Tom Gill or others would justify or excuse the killing of Mark Gill, unless such other party acted under the advice or under the control of Mark Gill." *Held*, error, inasmuch as it did not require the advice to or control over Tom Gill or others to make the deceased a participant in their acts, and responsible therefor; but if deceased acted together with them, and, knowing their unlawful intent, aided them by acts, or encouraged them by words or gestures in the commission of the violence, or agreed thereto, then he was a principal in the assault upon defendant, and was subject to the same rules as if he was the person who actually committed the assault. *Carrwright v. State*, 478.

2. The law of principals in crime applies as well to manslaughter as to any other offense. Though there can be no accomplice in manslaughter, several persons may so act together as to become principals in its commission. It is not, therefore, error to instruct the jury that the defendant might be convicted of manslaughter, although he did not himself inflict the mortal wound. *Id.*

## PRIVILEGED COMMUNICATIONS.

It is a well settled general rule that an attorney cannot be permitted to disclose communications made to him by his client in the course of their professional relations. It is no exception to this rule that the client turned State's evidence against his co-defendant and testified

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**PRIVILEGED COMMUNICATIONS—continued.**

for the prosecution; wherefore the trial court properly refused to permit the defendant's counsel to state in evidence communications made to him by the defendant while the relation of attorney and client existed. *Sutton v. State*, 490.

**PRIVILEGE OF COUNSEL.**

1. As tending to show bias, and for the purpose of enabling the jury to properly weigh the testimony of witnesses for the defense, it was proper to allow the State, on cross-examination, to elicit from such witnesses the fact that they testified before the grand jury in the same case, without being subpoenaed, and at the instance of the defendant; and in referring to the facts so elicited, in argument, the counsel for the State did not abuse his privilege. *Ashlock v. State*, 18.

2. Even when it is apparent that prosecuting counsel assumed and commented, in argument, upon a fact not in proof, this court will not, for that reason alone, reverse a conviction, unless it is made clearly to appear that such conduct was calculated to prejudice the rights of the defendant. *Bass v. State*, 62.

3. See the opinion *in extenso* for remarks of State's counsel, in argument, held not to amount to an abuse of privilege. *Spear v. State*, 98.

**PRIVILEGE OF WITNESS.**

See WITNESS, 1.

**PUBLIC ROAD.**

See OBSTRUCTION OF PUBLIC ROAD.

**PURCHASE OF CATTLE WITHOUT BILL OF SALE.**

1. In a prosecution for purchasing cattle without taking a bill of sale, the defendant proposed to prove that another person, to whom he gave money for the purpose, purchased the cattle for him, received them for him, and gave him a bill of sale which he said at the time was the bill of sale to the said cattle. He also offered in evidence the bill of sale. This evidence was excluded as irrelevant. *Held*, error; that, if defendant did in fact purchase the cattle through an agent, and the cattle were delivered to the agent in the absence of the defendant, he was entitled to such proof, which would constitute a good defense, unless it further appeared that he consented to the receiving of the cattle by his agent without a bill of sale. *Brockman v. State*, 54.

2. The venue of the offense of purchasing and receiving cattle without taking a bill of sale, is the county in which the cattle were purchased. There is no evidence of any character that the cattle in this instance were purchased, as alleged, in Karnes county. *Held*, fatal to the conviction. *Id.*

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## R.

## RAPE

See ASSAULT WITH INTENT TO RAPE.

1. The indictment charged that the rape was committed by force, and did not include a count that it was effected by threats. The State was permitted to prove that when the injured party attempted to give the alarm, the defendant placed his hand over her mouth, and commanded her to desist on pain of death. To this evidence the defense objected, because force was the only means alleged in the indictment. But *held*, that the evidence was admissible; first, because it was *res gestæ*; second, because it bore directly upon the question of consent; third, because it showed the intent of the assailant; and fourth, because it was an important fact to be considered in passing upon the character and degree of force used by defendant to accomplish his purpose. *Bass v. State*, 62.

2. With regard to force, in the perpetration of rape, the statute, Article 529 of the Penal Code, requires that it shall be such as might reasonably be supposed to be sufficient to overcome resistance, taking into consideration the relative strength of the parties, and other circumstances in the case. In determining upon the sufficiency of the force used, the jury is authorized to take into consideration threats made at the time of the commission of the offense. *Sharp v. The State*, 15 Texas Court of Appeals, 171, cited and approved. *Id.*

3. See evidence held sufficient to support a capital conviction for rape. *Id.*

## REASONABLE DOUBT.

1. Upon the question of reasonable doubt the court charged the jury that if they had a reasonable doubt of the defendant's guilt, arising from the evidence in the case, they should acquit. *Held*, sufficient; and that the reasonable doubt is not required to be charged with reference to every, or any particular phase of the case. *Ashlock v. State*, 18.

2. Reasonable doubt is a doctrine to be applied to the case made by the State, and not to a defense set up by the accused. *Rockhold v. State*, 577.

## RECOGNIZANCE.

See BAIL BOND.

## SCIRE FACIAS.

1. When offered in evidence, the recognizance was objected to, because it recited that D. had been convicted of swindling, for which offense he had not been indicted. For the reasons enumerated in the preceding head notes, the objection was properly overruled. *Martin et al. v. State*, 205.

2. One of the requisites of a recognizance is that it shall state the court before which, and the time and place when and where, the principal cognizor is bound to appear. The condition of the recognizance in this



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 RECOGNIZANCE—*continued*.

case is that the cognizor "shall well and truly make his personal appearance before the honorable district court of Parker county, Texas, now in session, at the court house thereof, in the town of Weatherford, and here remain from day to day," etc. *Held*, a full and explicit compliance with the statute. *Ray v. State*, 268.

3. Article 452 of the Code of Criminal Procedure provides that "if a bail bond, or recognizance, be valid and binding as to the principal and one or more of the sureties, they shall not be exonerated from liability because of its being invalid and not binding as to another or other sureties." Under this statute, judgment can be rendered in favor of one surety, and against the principal and another surety, if the facts so require. See this case in illustration. *Id.*

4. *Scire facias*, as well as any other suit, may be dismissed as to one defendant and maintained as to another. Even where one surety has not been served, suit may be dismissed as to him and judgment taken against those served; and if judgment be taken against the surety not served, it may be dismissed as to him, even in the Appellate Court. *Id.*

5. When a recognizance is taken in open court, it will be presumed that the penal sum named in the recognizance was the sum fixed by the court, whether such statement is explicitly made in the recognizance or not. *Thrash v. State*, 271.

6. Recognizance recites that the offense charged in the indictment against the principal cognizor was "theft of bacon of the value of twenty-seven dollars." *Held*, sufficient to name an offense against the laws of this State. *Id.*

7. As to time and place of appearance, the condition of the recognizance is as follows: "Shall well and truly make his personal appearance before the honorable district court in and for Hood county, now in session, at the court house thereof, in the town of Granberry, and there remain from day to day," etc. *Held*, that the bond states fully the time and place, and the court before which the principal cognizor was bound to appear. *Id.*

8. See the statement of the case for a *scire factas held* to be in substantial compliance with the rules by which the sufficiency of such writs are tested. *Id.*

## RELIGIOUS WORSHIP.

*See* DISTURBING RELIGIOUS WORSHIP.

## REPEALED LAWS.

*See* ATTACHMENT FOR WITNESS.

DISTURBING RELIGIOUS WORSHIP, 3.

1. Since the appeal in this case was perfected, the voters of the precinct in which, at the time of the trial, the "Local Option" law was in force, have determined against prohibition, and such fact has been proclaimed in the manner prescribed by law. Under such circumstances the judgment must be reversed and the prosecution dismissed, because there

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REPEALED LAWS—*continued.*

is no longer any law in force by authority of which the judgment can be enforced. *Mulkey v. State*, 58.

2. Though a subsequent statute on a given subject be not repugnant in all its provisions to a prior one on the same subject, yet if it clearly appears that the later statute was intended to prescribe the only rules which should govern the subject, the effect of the later statute is to repeal the former. *Harold v. State*, 167.

3. When a subsequent statute, revising the subject matter of a former one, is evidently intended as a substitute for it, although it contains no express words to such effect, it must be held to operate to repeal the former to the extent to which its provisions are revised and supplied. *Id.*

4. When a statute is revised, or one act is framed from another, some parts being omitted, the parts so omitted cannot be revived by construction, but are to be considered as annulled. *Id.*

5. It is true that a construction which repeals a former statute by implication is not favored, and it is equally true that statutes *in pari materia*, and relating to the same subject matter, are to be considered together; nevertheless it is a universal rule that when the new statute, in itself, comprehends the whole subject, and creates a new, entire and independent system respecting the subject matter, it repeals and supercedes all previous systems and laws respecting the same subject matter. *Id.*

6. Under the rules of construction announced, it is *held* that Article 694 of the Penal Code was repealed by the "Act for the protection of the wool growing interests of the State of Texas," passed April 4, 1883. *Id.*

7. The effect of Article 726 of the Revised Penal Code was to include in the generic term "horse" all animals of the horse kind, as distinguished from ass or mule, and to the extent of destroying all legal distinctions between the animals embraced, it operates to repeal the statute previously in force. The Final Title to the Revised Statutes, by express provision, prescribed for pending cases, both civil and criminal, the following rule: "No offense committed, and no liability, penalty or forfeiture, either civil or criminal, incurred prior to the time when any statute, or part thereof, shall be repealed or altered by the Revised Statutes, shall be discharged or affected by such repeal or alteration; but prosecutions and suits for such offenses, liabilities, penalties or forfeitures, shall be instituted and proceeded with in all respects as if such prior statute or part thereof had not been repealed or altered, except that where the mode of procedure or matters of practice have been changed by the Revised Statutes, the procedure had after the Revised Statutes shall have taken effect in such prosecution or suit shall be, as far as practicable, in accordance with the Revised Statutes." Under this rule it was necessary in this case that the proof should have supported the allegation that the animal stolen was a "gelding," because the theft was committed before the revision of the Codes, and the indictment described the animal as a gelding. *Johnson v. State*, 402.

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**REPUGNANCY.**

Repugnancy in an indictment arises when it contains an allegation which is directly contradicted by other statements in the indictment. See the opinion in this case in illustration. *Hardeman v. State*, 1.

**RES ADJUDICATA.**

See JEOPARDY

**RES GESTÆ.**

The competency as evidence of a defendant's explanation, made directly after the commission of the alleged offense, depends entirely upon whether or not such explanation, if material, is also a part of the *res gesta*. In determining whether or not such explanation is or is not a part of the *res gesta*, the test is, were the declarations the facts talking through the party, or the party talking through the facts? In this case the bill of exceptions taken to the rejection of the proposed explanation fails to disclose what that explanation was. Under such circumstances, this court cannot pass upon the question of materiality. *Hobbs v. State*, 517.

**RETAILING.**

See LOCAL OPTION LAW.

UNLAWFUL SALE OF LIQUOR.

**RIGHT OF TRIAL BY JURY.**

Right of trial by jury is, by section 15 of the Bill of Rights, declared to be inviolate. Any party to a civil suit is entitled to a trial by jury, upon complying with the requirements of law; while in criminal cases, save in specially excepted cases (Code of Criminal Procedure, Article 594), the only mode of trial upon an issue of fact is by jury. Proceedings in forfeited bail cases, after judgment *nisi* and the issuance of citation, are the same as in civil cases, except where otherwise provided by statute; and upon the question of trial by jury in such cases, the rules applicable to civil cases will apply. The applicants in this case having complied with the law entitling them to a jury, the court below erred in withholding the right. *Short v. State*, 44.

**ROBBERY.**

1. Indictment for the offense of robbery which pursues, substantially, the common law precedents for that offense is sufficient. It is not, however, always sufficient to charge an offense in the exact words of the statute defining it, the rule being that the facts constituting the offense must be alleged by direct, positive and certain averments, and not by way of argument or inference. Failing to allege that the party robbed was the party assaulted by the defendant, and put in fear of his life or bodily harm, the indictment, in this case, is insufficient, wherefore the motion in arrest of judgment should have prevailed. *Trimble v. State*, 115.

2. It is only in cases when the State relies solely upon circumstantial

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**ROBBERY—continued.**

evidence to secure a conviction that the trial court is required to charge the principles of law governing circumstantial evidence. *Makinson v. State*, 133.

## S.

**SALE OF LIQUOR ON ELECTION DAY.**

*See* INDICTMENT, 7.

**SCIRE FACIAS.**

*See* BAIL BOND.

RECOGNIZANCE.

SURETY.

1. S. was bailed to appear before a justice's court of C. county, upon a charge of wilfully burning a public bridge. Failing to make his appearance, forfeiture of the bond was taken, and judgment *nisi* was entered, and upon hearing was made final. From this judgment S. and his sureties appealed to the county court, the appeal bond being signed by all the parties against whom judgment was rendered in justice's court, and by three other parties as sureties on the appeal bond. Judgment in the county court was rendered against the same parties to the judgment in the justice's court, but no judgment was taken against the three parties who signed the appeal bond as sureties. The same parties to the appeal to the county court appeal from that court to this, with the same parties as sureties on their appeal bond to this court, who were sureties on their appeal bond to the county court. The State's motion to dismiss the appeal to this court is based upon the following grounds: 1. Because there is no final judgment in the county court from which this appeal will lie. 2. Because the sureties on the appeal bond to the county court were not disposed of by the judgment of the county court. 3, 4 and 5. Because the sureties on the appeal bond to this court, being parties to the suit, because of being sureties on the appeal bond to the county court, are not competent sureties to the appeal bond to this court; and hence the appeal bond to this court is without sureties. *Held*, that, in order to authorize this appeal, it was not necessary that the final judgment should have disposed of the sureties on the appeal bond from the justice's to the county court; that, no judgment having been rendered against the sureties on the appeal bond to the county court, they were competent sureties on the appeal bond to this court. *Short v. State*, 44.

2. The effect of a general denial is to put in issue all the material, issuable allegations of the plaintiff's petition. In a proceeding upon a forfeited bail bond, the citation serves the purpose of a petition, and a general denial pleaded to it puts in issue all the allegations constituting the State's cause of action, and casts upon the State the burden of proving such allegations. This being a *scire facias* case, and the general denial being pleaded, the trial court erred in holding that the case involved no question of fact. *Id.*

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SCIRE FACIAS—*continued*.

3. A peace officer making an arrest for a felony by virtue of the warrant of a magistrate, has no right to take bail, but must take the accused before the proper magistrate named in the writ. The warrant in this case charged a felony, and bail was accepted by the officer who made the arrest. *Held*, that the motion to quash the bail bond should have prevailed. *Id.*

4. One of the requisites of a bail bond is that it shall state the *time* and *place* when and where the accused binds himself to appear, and the court or magistrate before whom he is to appear. In stating the time, it is sufficient to specify the term of the court; and in stating the place, it is sufficient to specify the name of the court or magistrate, and of the county. *Fentress v. State*, 79.

5. In this case the bail bond was conditioned as follows: "Now if the said Rainey Fentress shall make his personal appearance before the district court of Bexar county to answer to said indictment *instantly*, to be holden in the town of San Antonio, A. D. 1882, there to remain until discharged by the court," etc. *Held*, sufficient, both as to place and time, the term "*instantly*" having a legal signification, and usually meaning within the next twenty-four hours, and when not so meaning, signifying within a reasonable time, under the circumstances of the case with reference to which it is used. See the opinion *in extenso* on the question, and note the distinction between the statute on the subject now in force and that upon which the cases of *Jackson v. The State*, 13 Texas, 218, and *Busby v. The State*, *Id.*, 187, were decided. *Id.*

6. See the statement of the case for a bail bond *held* sufficient to show that an indictment, charging the principal therein with an offense against the laws of the State, was pending in the district court of Bexar county. Note, also, that it is a valid obligation, wherefore the motion to quash the same was properly overruled. *Id.*

7. See the statement of the case for an answer of sureties which the trial court properly held to present no defense to the action, inasmuch as the facts set up do not come within any of the provisions of Article 452 of the Code of Criminal Procedure, which prescribes the only causes which will operate to exonerate the principal and sureties from liability upon the forfeiture taken. *Id.*

8. Bail bond executed before indictment is not vitiated because it fails to name the precise offense of which the principal therein was subsequently indicted. It is sufficient if it name some offense against the laws of the State. *Vivian v. State*, 203.

9. Theft is *eo nomine* an offense against the laws of this State, and it includes the theft of certain animals. The bond in this case, executed before indictment, recited that the accused was charged with the theft of animals. It is urged that, in failing to specify the kind of animals stolen, the bond is not in compliance with the law. But it is *held* sufficient, under subdivision 3 of Article 288 of the Code of Criminal Procedure. *Id.*

10. Bail bond, in stating the place where the accused is bound to appear, is sufficient if it specify the name of the court or magistrate, and of the county. The bond in this case conditions that the accused "shall be

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SCIRE FACIAS—*continued*.

and appear before the honorable district court on the first day of the next term thereof, to be begun and holden at the court house in Carrizo Springs, in said county, on," etc. The bond nowhere recites the name of a county, but recites that the accused has been arrested by virtue of a warrant issued by "J. R. Sweeten, J. P. Pr. No. 1, D. C." *Held*, that this court is not authorized to presume that the initials "D. C." signify "Dimmit county," nor that "Carrizo Springs" are in Dimmit county. In this respect the bond fails to state the name of the county before the district court of which the accused was bound to appear, and for that reason the motion to set aside the judgment *nisi* should have prevailed. *Id*.

11. Under an indictment for theft, D. was convicted of swindling. Appealing to this court, with appellants as sureties, he obligated himself, in his bond, to appear before the district court and abide the decision of his appeal. The conviction was affirmed on appeal, and D. failing to appear on his bond before the district court, the same was forfeited, and proper process to show cause, etc., was served on appellants. Appellants answered *scire facias* by general denial only, pleading none of the exonerating provisions of Article 452 of the Code of Criminal Procedure. The trial resulted in final judgment against appellants. On the trial, the State read in evidence the indictment against D. for theft, and, over objection, the judgment of conviction for swindling. The objection is, that the conviction was not supported by the indictment, but was for a different offense, wherefore the judgment was a nullity, and inadmissible in evidence. *Held*, that it was only necessary for the State to show the recognizance and the judgment *nisi* declaring its forfeiture; that, while the judgment and indictment were not necessary evidence, their admission could in no way affect the issue in the case. *Martin et al. v. State*, 265.

12. The sufficiency of an indictment, or the regularity of the proceedings preliminary to the conviction of an offense charged by the indictment, cannot be questioned in a *scire facias* proceeding. In this case, the judgment of the Court of Appeals, affirming the judgment of conviction, was the law of the case, and could not be questioned in the court below. Nor can sureties on an appearance bond be heard in any way to question the guilt of their principal. *Id*.

13. Article 452 of the Code of Criminal Procedure prescribes the only causes which will exonerate principal and sureties from liability upon the forfeiture of a bail bond, and none of them reach to the sufficiency of the indictment or the validity of the conviction. *Id*.

14. Habeas corpus may be invoked to escape the enforcement of a void conviction. But where a convicted defendant appeals, and he and his sureties obligate themselves to abide the judgment on appeal, they are bound by the obligation, whether the conviction was void or valid. *Id*.

15. One of the requisites of a recognizance is that it shall state the court before which, and the time and place when and where, the principal cognizor is bound to appear. The condition of the recognizance in this case is that the cognizor "shall well and truly make his personal ap-

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**SCIRE FACIAS—continued.**

pearance before the honorable district court of Parker county, Texas, now in session, at the court house thereof, in the town of Weatherford, and here remain from day to day," etc. *Held*, a full and explicit compliance with the statute. *Ray v. State*, 268.

16. Article 452 of the Code of Criminal Procedure provides that "if a bail bond, or recognizance, be valid and binding as to the principal and one or more of the sureties, they shall not be exonerated from liability because of its being invalid and not binding as to another or other sureties." Under this statute, judgment can be rendered in favor of one surety, and against the principal and another surety, if the facts so require. See this case in illustration. *Id.*

17. Scire facias, as well as any other suit, may be dismissed as to one defendant and maintained as to another. Even where one surety has not been served, suit may be dismissed as to him and judgment taken against those served; and if judgment be taken against the surety not served, it may be dismissed as to him, even in the Appellate Court. *Id.*

18. A recognizance is not only a joint, but a joint and a several undertaking, and if good as to the principal and any one of the sureties, they are not only bound, but are liable, though another surety may not be. *Id.*

19. When a recognizance is taken in open court, it will be presumed that the penal sum named in the recognizance was the sum fixed by the court, whether such statement is explicitly made in the recognizance or not. *Thrash v. State*, 271.

20. Recognizance recites that the offense charged in the indictment against the principal cognizor was "theft of bacon of the value of twenty-seven dollars." *Held*, sufficient to name an offense against the laws of this State. *Id.*

21. As to time and place of appearance, the condition of the recognizance is as follows: "Shall well and truly make his personal appearance before the honorable district court in and for Hood county, now in session, at the court house thereof, in the town of Granberry, and there remain from day to day," etc. *Held*, that the bond states fully the time and place, and the court before which the principal cognizor was bound to appear. *Id.*

22. See the statement of the case for a *scire facias* held to be in substantial compliance with the rules by which the sufficiency of such writs are tested. *Id.*

23. That a bail bond binds the obligors for the appearance of the principal from day to day and term to term of the court, until discharged, is not a condition more onerous than that imposed by law. *Pickett v. State*, 648.

24. The suretyship of a married woman invalidates a bail bond only as to her, not as to the principal and other sureties. *Id.*

25. Judgment nisi is fatally defective if it fails to state that the same will be made final unless good cause be shown at the next term of the court why the defendant did not appear. *Id.*

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**SELF-DEFENSE.**

1. Upon the subject of self-defense, which was clearly presented by the evidence, the court charged as follows: "The jury are further charged, that if the killing was done in the necessary defense of the slayer, or any of them; that is, to protect himself or themselves from immediate and imminent danger of death or great bodily harm from the violence of the deceased, which was not provoked or sought for by the slayer, and which could not be avoided by any other means except retreating, then it would not be an unlawful killing, but would be justifiable homicide." *Held*, insufficient. In the first place, if the slayer is in immediate and imminent danger of death or serious bodily harm from the violence of the deceased, he is not required to resort to other means than killing his assailant to protect himself, but in such case he is justified in acting promptly and slaying his adversary at once. In the second place, the charge erroneously limits the right of self-defense to actual danger of death or serious bodily harm, whereas the true rule is that if appearances are such as to create in the mind of the slayer a reasonable apprehension of death or serious bodily harm, and he acts under the influence of this apprehension, he acts in self-defense, although there was in fact no danger of his being killed or receiving serious bodily injury. In the third place, the charge, in view of the evidence in this case, erroneously restricted the right of self-defense to defense against the violence of the deceased alone. *Cartwright v. State*, 478.

2. Upon the question of self-defense, the trial court properly charged that the defendant's right of self-defense ceased when his danger, real or apparent, ceased. But note the opinion for circumstances under which, if death had resulted from an assault, the offense would not have been of a grade higher than manslaughter. *Hobbs v. State*, 517.

8. Charge of the court instructed the jury as follows: "But while the defendant had the legal right to protect himself from such actual or supposed attack without retreating, and to use all the force necessary for that purpose, even to the extent of slaying his adversary, and he may continue to use force until all danger, actual or apparent, has passed, he cannot use any more force than was necessary for that purpose; and should you believe beyond a reasonable doubt that the deceased did assault the defendant, but that he abandoned said assault, and it reasonably appeared to the defendant that he had ceased all violence toward him, and that afterward the defendant shot the deceased, he would be guilty of manslaughter." *Held*, error, inasmuch as the charge, in effect, instructed that the jury must believe, beyond a reasonable doubt, that the deceased did assault the defendant before they could find the grade of manslaughter. In other words, it reversed the rule which obtains in criminal cases, and applied the doctrine of reasonable doubt against, instead of in favor of, the defendant. See the opinion *in extenso* on the question. *Rookhold v. State*, 577.

4. Charge of the court upon the question of justifiable homicide required the defendant to resort to all other means, except flight, of preventing the threatened injury to himself, before taking life, regardless of the imminence of his peril. *Held*, error under the facts in proof. *Morgan v. State*, 593.



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## SPECIAL LAWS.

See JUDICIAL COGNIZANCE.

## STANDARD OF VALUE.

See THEFT, 5, 6.

## STATEMENT OF FACTS.

1. In the absence of a proper statement of facts the only duty of this court is to determine whether the indictment is sufficient to sustain the charge of the court and the judgment of conviction; and a statement of facts filed after the adjournment of court, in the absence of an order of court, embodied in the record, showing that such filing was authorized, cannot be considered by this court for any purpose whatever. *Thompson v. State*, 74.

2. Statement of facts shown by the transcript to have been filed after the adjournment of the trial term of the court will not be considered for any purpose, unless the transcript also brings up an order of court authorizing it to be filed after the adjournment. *Brown v. State*, 197.

3. In the absence of a statement of facts, this court will inquire no further than to ascertain whether or not the indictment was sufficient to charge the offense and sustain the charge of the court and the verdict of the jury, except as to matters so presented by bills of exception as to be determinable without a statement of facts or where it appears that the conviction was not had by due course of law. *Id.*

4. Statement of facts, unless authenticated by the trial judge, will not be considered by this court for any purpose whatever. *Bennett v. State*, 236.

5. Statement of facts filed after the adjournment of court, unless such filing is shown by the transcript to have been authorized by the court, will not be considered by this court for any purpose. *Brown v. State*, 245.

6. Statements of facts, in habeas corpus cases, must be made up and certified by the trial judge in the same manner as in other criminal cases. Not even in habeas corpus cases can a statement of facts approved after the expiration of ten days allowed by the order of court be considered for any purpose. *Barber, ex parte*, 369.

7. In this case the trial court of its own motion entered up an order granting ten days after adjournment for the preparation of a statement of facts. Such statement of facts was prepared within the ten days and presented to the judge for his approval. It was, however, disapproved by him, and he prepared no statement himself in lieu thereof. This action of the court is alone relied upon for reversal. *Held*, that, as the appellant was not in default, the error necessitates the reversal of the judgment. *Johnson v. State*, 373.

## STATUTES CONSTRUED.

See CONSTRUCTION OF STATUTES.

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**SUBSTITUTION OF LOST PAPERS.**

1. After the appeal in this case was perfected the record in the trial court, except the judgment of conviction, the amended motion for new trial, the judgment overruling the same, and the appellant's recognizance, was destroyed by fire. At the next term of the court the county attorney, over objection, was permitted to substitute the complaint and information. Thereupon the defendant was permitted to substitute the other portions of the record, consisting of the statement of facts, bills of exception, charge of the court, assignment of errors, etc. *Held*, that such substituted papers, under the rule announced, cannot be considered by this court. *Turner v. State*, 318.

2. The substituted papers in this case being such as cannot be considered, the conviction is without information or indictment to sustain it. *Id.*

3. Where an indictment has been accidentally destroyed after trial and conviction, it may be supplied either by a second indictment or by substitution in the mode provided by law. *Harwood v. State*, 416.

4. If the trial court in criminal cases has any power to substitute lost papers, other than the indictment or information, that power is derived either from Article 1475 of the Revised Statutes, or the inherent authority of the court to supply its own records when lost or destroyed. When supplied under the provisions of the statute, three days notice to the adverse party is expressly required; and when supplied under the inherent power of the court reasonable notice is required upon general principles. *Gillespie v. State*, 641.

5. Quære whether an indictment can be substituted before trial. *Schultz v. The State*, 15 Texas Court of Appeals, 258, referred to on this question. *Id.*

**SURETY.**

*See* BAIL BOND.

PRACTICE, 28.

1. A recognizance is not only a joint, but a joint and several undertaking, and if good as to the principal and any one of the sureties, they are not only bound, but are liable, though another surety may not be. *Ray v. State*, 268.

2. The suretyship of a married woman invalidates a bail bond as to her, but not as to the other sureties and the principal obligor. *Pickett v. State*, 648.

**SWINDLING.**

1. Information to charge the offense of swindling must allege that some false representation as to existing facts or past events was made by the accused. Mere false promises or false professions of intention, though acted upon, are not sufficient. The information in this case charged, substantially, that defendant promised to pay one B. fifty cents for four certain fish, if said B. would deliver the same at his, defendant's, house; that B. did so deliver the fish, and that the said representations of the defendant were then and there false, etc. *Held*, that the information was insufficient to charge swindling or any other offense. *Allen v. State*, 150.

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SWINDLING—*continued.*

2. An indictment for swindling having unnecessarily described the money obtained by fraudulent representations to be "good, lawful and current money of the United States of America," it was essential to the validity of the conviction that the money be proved as alleged. *Chil. ders v. State*, 524.

3. See the opinion *in extenso* for evidence held insufficient to sustain a conviction for swindling. *Id.*

## T.

## THEFT.

See ACCOMPLICE EVIDENCE, 1.

BAIL BOND, 6.

BURGLARY.

POSSESSION OF RECENTLY STOLEN PROPERTY, 2.

SCIRE FACIAS, 9.

VARIANCE, 1.

1. The defense was that the defendant honestly acquired possession of the alleged stolen animal, having won her at a game of cards from one H. The evidence was to the effect that K., the owner, turned the animal out on November 12. On the fourteenth day of the same month a witness saw said H. in possession of an animal suiting the description of the one stolen. After this the mare in question was seen on her range for a week or more. A defense witness testified that, a day or two before the defendant was found in possession of the animal in D. he saw the defendant win her from H. at a game of cards; that the mare was not then present, but H. said that she was running at large in a certain lane. Upon this state of evidence the court charged the jury: "If you believe from the evidence that the defendant won the mare in controversy from some person who claimed to be the owner of said animal, at a game of cards, and that he believed such person to be the owner, you will find the defendant not guilty, notwithstanding you may believe that such person was not in fact the owner of the mare." The court refused an additional charge to the effect that if defendant acquired possession of the mare in any way from H., who had stolen her, he would not be guilty of theft, though he may have known that H. stole her. *Held*, that the charge as given was sufficient; that though the principle invoked by the special charge is correct in the abstract, its refusal was not error in this case, in view of evidence which disclosed that even if H. had stolen the animal prior to that time, he had abandoned possession of her, and she was again on her range and in the constructive possession of her true owner. The doctrine applicable to this case is that, when subsequently taken from her range by the defendant, that act constituted another and distinct taking, and if such taking was fraudulent it was theft, although authorized by H. *Ashlock v. State*, 13.

2. It is a well settled rule of practice that, "when necessary to establish identity in developing the *res gesta*, or in making out the guilt of the accused by circumstances connected with the

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THEFT—*continued.*

theft, or to explain the intent with which the accused acted with respect to the property for the theft of which he is on trial, it is competent for the State to prove that other property was stolen at or about the same time and in the same neighborhood from which the property in question was stolen; and that this other property was found in the possession of the defendant when arrested for the theft of the property for which he is on trial. Under such state of case, however, it is the duty of the court to explain, in the charge to the jury, the purpose of such proof." *House v. State*, 25.

8. The indictment charged that the defendant, on July 30, 1883, in the Creek Nation, Indian Territory, did fraudulently take, steal and carry away from the possession of one B., three horses, the personal property of said B., without his consent, etc. That, on August 1, 1883, the said defendant did bring the said horses into the county of G., State of Texas. That on the said thirtieth day of July, 1898, the said acts of defendant constituted the offense of theft of horses, and were punishable as such, under and by virtue of the laws of the said Creek Nation, then in full force. *Held*, that the indictment was sufficient to charge the offense of horse theft, wherefore the motion in arrest of judgment was properly overruled. *Cowell v. State*, 57.

4. To constitute theft there must be an intent on the part of the person taking the property, at the time of the taking, to deprive the owner of the property of the value of the same, and to appropriate it to the use and benefit of the person taking. The word "*it*" has been properly held to refer to the antecedent word "property." In this case the indictment charges the intent as follows: "With the fraudulent intent to deprive the said Elisha Davis of the value of same, and to appropriate the value of the same"—using the word "value" instead of the word "*it*." *Held*, that the indictment is in substantial compliance with Article 420 of the Code of Criminal Procedure, and is therefore sufficient. *Thompson v. State*, 74.

5. Theft of ordinary property is a felony or misdemeanor according to whether the article stolen was worth as much as or more than twenty dollars, or less than that sum, and when that value is an issue to be determined in the trial, so as to ascertain the grade of the offense, it is the duty of the court to charge the jury upon the standard of value; which is the market value of the article if it have such a value, and if not, the amount it would cost to replace it. The requested charge in this case, though not properly embodying the law, was sufficient to call the attention of the trial court to the omission, and the failure to charge upon the standard of value was error. *Martínez v. State*, 122.

6. Any evidence from which the jury can infer the value of a stolen chattel is evidence; as, for instance, what the owner testifies of its value to him, the opinions of witnesses acquainted with the value of like property, what such property has brought at actual sales, etc. *Id.*

7. In a prosecution for the theft of a saddle, but one witness located the saddle in the possession of the defendant, and that witness was the party in whose possession it was found. Having testi-

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**THEFT—continued.**

fied that he purchased the saddle from the defendant, the defendant, for the purpose of laying a predicate to impeach the witness by showing his complicity in the theft, asked the witness on cross-examination the following question: "Did your wife, in your presence, at your house, and in the presence of Juan Montez and F. Gallan, on the tenth day of December, 1888, deny that the saddle was in your house, and deny all knowledge of said saddle?" *Held*, that for the purpose it was asked, the question was competent, and the exclusion of the answer thereto was error. *Id.*

8. Property that is lost, equally with other property, may be the subject of theft. To constitute theft of lost property, however, the fraudulent intent, which is the gist of the offense, must exist in the mind of the taker at the time of the taking; and in case of lost property, the time of the taking is the time of the finding of the property. If the fraudulent intent did not exist at the time of the taking, no subsequent fraudulent intent in relation to the property will constitute theft. Note, in the opinion, a summary of evidence which demanded of the trial court a charge embodying the principle announced. Note also a charge formulated by this court as responsive to this issue. *Id.*

9. Indictment for theft described the stolen property as "one twenty dollar gold piece of the value of twenty dollars, current money of the United States, and one five dollar bill in money of the value of five dollars, and one pocket knife of the value of fifty cents, of the corporeal personal property of J. W. McKnight." The motion in arrest of judgment alleged the insufficiency of the description of the alleged stolen property. *Held*, sufficient, under Article 732 of the Code of Criminal Procedure, which declares "money" to be "property," and under Article 427 of the same Code, which provides that, "when it becomes necessary to describe property of any kind in an indictment, a general description of the same by name, kind, quality, number and ownership, if known, shall be sufficient." The motion in arrest of judgment was properly overruled. *Bryant v. State*, 144.

10. Indictment for the theft of a watch and chain from the person of the owner alleged the aggregate value of the two articles. *Held*, not error to admit evidence of the value of the watch alone. *Bennett v. State*, 236.

11. Theft from the person is, *per se*, a felony without reference to the value of the article stolen, if of any value whatever. *Id.*

12. In a prosecution for the theft of a mare, the defendant proposed to prove by a witness that at the time he, the defendant, returned on the morning that he went out to hunt his two horses, and after he returned to the K. ranch, he stated to the witness that he, defendant, had failed to find but one of his horses; that some person had taken his other horse, and that he found the mare in question with his horse that was not taken; that he intended to take the said mare to Uvalde and see if he could find her owner; that he supposed the person who took his missing horse left the mare with his other horse—that if he could find the mare's owner in Uvalde county he would deliver

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**THEFT—continued.**

up the animal, and that he, the defendant, did not claim the mare. *Held*, that while not technically *res gesta*, the proposed evidence was competent, not only to show the character of defendant's possession, but the defendant's intent in connection with his possession; wherefore the court erred in excluding the proposed evidence. *Saltillo v. State*, 249.

13. See evidence *held* insufficient to support a conviction either for theft of a horse, or for driving it from its accustomed range. *Id.*

14. Under the statute in force prior to the adoption of the Revised Codes, the theft of a gelding was a specific offense. The word "horse" was not used in that statute in its comprehensive and generic sense, and did not include a "gelding," "mare" or "colt." Indictment for the theft of a gelding, presented before the adoption of the Revised Codes, properly described a stolen animal as a "gelding." *Johnson v. State*, 402.

15. To apply the new provision (Article 746 of the Revised Penal Code) in a trial for horse theft committed before the Revised Codes took effect would be *ex post facto*, and it has been properly *held* that a variance between the allegation and the proof is fatal to the conviction, notwithstanding the trial was held since the Revised Statutes took effect. *Id.*

16. See the statement of the case for evidence *held* insufficient to support a conviction for theft of a gelding, inasmuch as it fails to establish the identity of the defendant as the thief, beyond a reasonable doubt. *Id.*

17. A fraudulent taking is a necessary and an indispensable element of theft. In order to constitute that offense under our law it is not necessary that the property be removed any distance from the place of taking; it is sufficient if it has been in the possession of the thief, though it may not be moved out of the presence of the person deprived of it, nor is it necessary that any definite length of time shall elapse between the taking and the discovery thereof; if but a moment elapse, the offense is complete. *Madison v. State*, 435.

18. The facts in this case showed that the defendant, who claimed to own hogs running in the same range where the hogs in question were found, said that he supposed they belonged to him, called them up, and sold them to a third party, who, a day or two afterwards, took possession. The court, in substance, charged that the mere sale of the hogs was equivalent to a taking. *Held*, error; that in order to amount to theft, the seller of the stolen property must have had some manner of possession of the property. The rule is invariable that there must be an actual taking or a conversion of the stolen property in order to support a conviction for theft. *Id.*

19. Consistent with the doctrine stated is the rule that, "if the thief fraudulently procure a person innocent of any felonious intent to take the goods for him, his offense will be the same as if he had taken the goods himself." See the opinion and statement of the case for evidence *held* sufficient under this rule to show a taking and appropriation by the defendant. *Id.*

20. But see the statement of the case for evidence *held* insufficient to disclose a fraudulent intent, and therefore insufficient to support the conviction. *Id.*

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**THEFT—continued.**

21. Charge of the court on the subject of possession of recently stolen property was as follows: "The possession alone of property shown to have been recently stolen is not in law sufficient to warrant the conviction of one charged with theft. Such possession, if proven, is only a circumstance for the jury to weigh and consider in connection with other established facts, in determining whether the accused is guilty of the offense charged or not. If, therefore, the alleged horse was stolen as charged, and if the said horse has been traced to the possession of defendant, such possession, if unsupported by other evidence, will not warrant the defendant's conviction; and if such be the case you will acquit the defendant. If, however, you find that such possession, if shown, is corroborated by other evidence, then, to warrant the defendant's conviction, all the evidence, taken and considered together, including the fact of possession, if it exists, should be sufficient to exclude from your minds every reasonable theory consistent with the defendant's innocence." *Held*, error, inasmuch as the charge was calculated to impress the jury with the idea that, if the mere fact of possession was corroborated, they were authorized to convict. The rule upon the subject is that there must be other evidence of guilt besides recent possession, and that such evidence, together with the recent possession, must be sufficient to establish in the minds of the jury the defendant's guilt to a moral certainty, beyond a reasonable doubt. *Tucker v. State*, 471.

22. See the opinion for a summary of evidence *held* insufficient to sustain a conviction for horse theft. *Id.*

23. The doctrine that, in order to justify a conviction for theft committed out of the State, it must be shown, with other requisites, that the party who committed the theft brought the property into this State, or, at least, that he had possession or control over it after it came into this State, is unquestionably supported by the letter of the law. But, if the proof shows that the accused aided in taking the stolen property in another State, furnished the means for its transportation into this State, came to this State himself in pursuance of an agreement to do so, and in this State received his portion of the fruits of the crime, he, in contemplation of law, brought the property into this State, exercised possession and control over it in this State, and was, from its inception, a principal in the crime. *Sutton v. State*, 490.

24. After their retirement, the jury returned into court and requested further instructions as to whether or not they were authorized to consider facts proved to have transpired in Texas, in determining whether or not the accused was present when the property was stolen in the Chickasaw Nation. The court charged as follows: "In order to determine whether or not the defendant was present at the commission of the alleged offense, the jury are authorized to take into consideration all the facts and circumstances proven in the case in so far as the same have any bearing on the question, without reference to which side of the river (State line) they may have occurred." *Held*, correct. *Id.*

25. Voluntary return of stolen property, such as under the provisions of Article 378 of the Penal Code will operate to reduce a theft

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THEFT—*continued.*

from the grade of felony to misdemeanor, must be made under the following circumstances: 1. The return must be voluntary, that is, willingly made; not made under the influence of compulsion, fear of punishment or threats. If, however, it be made under the influence of repentance for the crime, and with the desire to make reparation to the injured owner, it will be voluntary, although it may also be influenced by fear of punishment. 2. It must be made within a reasonable time after the theft, and before prosecution for the theft has been commenced. 3. It must be an actual, not merely a constructive return of the property into the possession of the owner. 4. The property returned must be the identical property, unchanged and all of it, that was stolen. *Bird v. State*, 528.

26. In this case the defendant drove the stolen animal about ten miles from its range, and attempted to sell it. Pending negotiations of sale, it was discovered by parties acquainted with it, when the party with whom the sale was being negotiated told the defendant to turn it loose, and that they would get it at another time. In a few days the owner told the defendant that all he wanted was the animal, and that if he would drive it back home, he, the owner, would not prosecute him, the defendant. Soon after this the owner found the animal on its accustomed range. *Held*, that under such circumstances the court should have given in charge the issue as to the voluntary return of the animal by the defendant; that, while not strictly a return of actual possession, it was such as was demanded by the owner, and therefore sufficient. *Id.*

27. See the statement of the case for evidence *held* insufficient to sustain a conviction for theft, inasmuch as it fails to establish the ownership of the stolen property when it was taken, as alleged in the indictment; and because it fails to establish that the property was taken with a fraudulent intent to appropriate, etc. *Fletcher v. State*, 635.

## THEFT OF LOST PROPERTY.

See THEFT, 8.

## THE "RULE."

Professional physicians being called to testify solely as medical experts, it was proper to exempt them from the operation of "the rule." Moreover, the enforcement of the rule as to the sequestration of witnesses is matter largely committed to the discretion of the trial judge, and one which will not be revised unless injury to the defendant is made manifest. *Spear v. State*, 98.

## THREATS.

See RAPE, 1, 2, 3.

## TRANSCRIPT.

See EVIDENCE, 23.

1. See the opinion for suggestions to trial judges respecting the in-  
 cumbrance of transcripts with foreign matter. *Beacoreno v. State*, 85.



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TRANSCRIPT—*continued.*

2. Statement of facts shown by the transcript to have been filed after the adjournment of the trial term of the court will not be considered for any purpose, unless the transcript also brings up an order of court authorizing it to be filed after the adjournment. *Brown v. State*, 197.

3. Unless the transcript on appeal discloses that a plea by or for the accused was entered, a conviction cannot stand. *Jackson v. State*, 373.

## U.

## UNLAWFUL SALE OF ESTRAYS.

1. Indictment comprehended the two counts of selling the stray animals without having given legal notice of the sale, and of selling the same when three adult bidders besides the family of the taker up were not present. After the evidence was submitted the State abandoned the first count, and elected to proceed on the second, notwithstanding which the court charged, in effect, that if the jury believed the defendant sold the said animals without having given legal notice, they should convict. *Held*, that such question was no longer in issue, and the defendant promptly excepting, the charge was erroneous upon the elementary principle that the charge of the court should be confined to the issues to be tried. *Goode v. State*, 411.

2. To the law (Rev. Stats., Art. 4583) regulating the sale of certain stray animals is appended a proviso which, in effect, forbids the sale, even under legal notice, unless there be present at the sale at least three adult bidders besides the members of the family of the taker up. In the charge authorizing the jury to convict in the event they believed that three adult bidders besides the members of the defendant's family were not present at the sale, the court declined to instruct as to what constitutes a "family," but declared that question to be a matter of proof, and authorized the jury to construe the meaning of the term for themselves. *Held*, error; that the term, when applied to a particular state of facts, is a mixed question of law and fact; that it is the province of the court to declare the law, so far as the fact is governed by law, and so far as the fact is a question of proof, it is to be deduced by the jury from the evidence, and not from their personal knowledge. *Id.*

3. In the construction of Article 4583, Revised Statutes, regarding the sale of certain estrays, the word "family" is *held* to mean the collective body of persons who live in one house, under one head or manager. *Id.*

## UNORGANIZED COUNTIES.

*See* JURISDICTION, 7.

## UNLAWFUL SALE OF LIQUOR.

*See* LOCAL OPTION LAW.

1. A single sale of intoxicating liquors does not of itself constitute pursuing or following the occupation of a liquor dealer within the purview of Article 110 of the Penal Code, and in charging that it does the trial court erred. *Standford v. State*, 381.

## Index.

UNLAWFUL SALE OF LIQUOR—*continued.*

2. It is not the sale, but the following of the occupation of selling of intoxicating liquors without having first obtained license, that is the gravamen of the offense denounced by the statute of this State. *Id.*

3. See the statement of the case for evidence held insufficient to support a conviction for unlawfully pursuing the occupation of a liquor dealer. *Id.*

## V.

## VARIANCE.

1. Under the Revised Code, the generic term "horse" embraces all animals of the horse kind. The indictment charged the offense of stealing "one horse." The bond described the offense as the theft of "one sorrel mare." *Held*, that the descriptions were not variant. *Collins v. State*, 274.

2. The true name of the owner of the alleged stolen property was Sam McCasland. The indictment alleged his name to be Sam McCasling. He was shown to have been equally well known by both names. *Held*, that the variance was not material. *Bird v. State*, 528.

3. The date of the offense is alleged in the complaint as "one thousand eight hundred eight four." In the information it is set out as "March 30, 1884." *Held*, that the complaint alleges an impossible date, and that the motion to quash the information upon the ground of fatal variance should have prevailed. *Heffner v. State*, 573.

4. Appearance bond recited that the principal cognizor was committed on a charge of theft of property over the value of twenty dollars. The condition in the bond described the offense merely as "theft." *Held*, not to be a variance, and sufficient to state an offense against the laws of this State. *Watkins v. State*, 646.

## VENUE.

See EVIDENCE, 20, 23.

1. In a prosecution for the theft of a mare it was proved by the State that the animal was running in her accustomed range in C. county, and had been there for a week prior to the time she was seen in the defendant's possession in D. county. *Held*, sufficient to prove that, when taken, the animal was in C. county. *Ashlock v. State*, 13.

2. The venue of the offense of purchasing and receiving cattle without taking a bill of sale, is the county in which the cattle were purchased. There is no evidence of any character that the cattle in this instance were purchased, as alleged, in Karnes county. *Held*, fatal to the conviction. *Brockman v. State*, 54.

3. This offense was committed in the unorganized county of Z., when that county was by law attached to M. county for judicial purposes. The indictment was properly found in M. county. Subsequently Z. county was attached to F. county for judicial purposes, and the district court of M. county transferred the indictment to the said F. county. Before the case came on for trial in F. county, Z. county was partially organized, but its

## Index.

*NOTE—continued.*

judicial autonomy was not completed, the Legislature having failed to provide times for holding the terms of the district court, and the district judge having failed to fix the same under the authority delegated to him by the act of April 25, 1882. When the case was called in F. county the defendant interposed his plea to the jurisdiction of the district court of that county, and insisted that the case should be transferred to Z. county. *Held*, that the plea was properly overruled. *Barr v. State*, 338.

4. The indictment contained two counts, one for embezzlement of goods held on commission by the accused, and the other for the conversion or embezzlement of the proceeds. The goods were received in B. county, and the proceeds converted in W. county. After the evidence was submitted, the State elected to claim a conviction on the count charging the embezzlement of the goods. *Held*, that the venue of the offense, under the count elected, was properly laid in B. county, the district court of which county had jurisdiction under Article 219 of the Code of Criminal Procedure, which provides that "the offense of embezzlement may be prosecuted in any county in which the offender may have taken or received the property, or through or into which he may have undertaken to transport it." Had the State elected to proceed on the second count, jurisdiction would have belonged to the district court of W. county, wherein the goods were sold and the proceeds appropriated. *Cole v. State*, 461.

5. To sustain a conviction for embezzlement in a county other than that in which the property was received, it must be shown that when the accused received the property in the latter county he undertook to transport it into the county where the conviction was had. *Reed v. State*, 586.

## VERDICT,

1. The validity of the conviction is assailed upon the ground that the verdict was not translated into the language of the defendant, who is a Mexican. In the absence of a bill of exceptions presenting such fact, this court cannot proceed upon the assumption that everything stated in the motion for new trial is true, when the record is silent on the subject. *Escareno v. State*, 85.

2. The indictment charging both burglary and theft, and the verdict being "guilty as charged in the indictment," the defendant stands convicted of both offenses, notwithstanding the presumptive intention of the jury to convict of burglary alone, inasmuch as the punishment assessed is the *minimum* prescribed for that offense. The issue of theft was not submitted by the charge. The court adjudged the defendant guilty of "robbery," and sentenced him for theft and burglary. *Held*, that the verdict cannot stand, inasmuch as it is not warranted by the charge, and because, though it is conformed to by the sentence, it is not by the judgment. *Miller v. State*, 417.

3. A verdict cannot be impeached by the affidavit of a juror; hence it was not error to overrule a motion for a new trial based upon the affidavit of a juror that the jury misconstrued the charge of the court. *Rockhold v. State*, 577.

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SUBSTITUTION OF LOST PAPERS.

1. After the appeal in this case was perfected the record in the trial court, except the judgment of conviction, the amended motion for new trial, the judgment overruling the same, and the appellant's recognizance, was destroyed by fire. At the next term of the court the county attorney, over objection, was permitted to substitute the complaint and information. Thereupon the defendant was permitted to substitute the other portions of the record, consisting of the statement of facts, bills of exception, charge of the court, assignment of errors, etc. *Held*, that such substituted papers, under the rule announced, cannot be considered by this court. *Turner v. State*, 318.

2. The substituted papers in this case being such as cannot be considered, the conviction is without information or indictment to sustain it. *Id.*

3. Where an indictment has been accidentally destroyed after trial and conviction, it may be supplied either by a second indictment or by substitution in the mode provided by law. *Harwood v. State*, 416.

4. If the trial court in criminal cases has any power to substitute lost papers, other than the indictment or information, that power is derived either from Article 1475 of the Revised Statutes, or the inherent authority of the court to supply its own records when lost or destroyed. When supplied under the provisions of the statute, three days notice to the adverse party is expressly required; and when supplied under the inherent power of the court reasonable notice is required upon general principles. *Gillespie v. State*, 641.

5. Quære whether an indictment can be substituted before trial. *Schultz v. The State*, 15 Texas Court of Appeals, 258, referred to on this question. *Id.*

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SURETY.

*See BAIL BOND.*

PRACTICE, 28.

1. A recognizance is not only a joint, but a joint and several undertaking, and if good as to the principal and any one of the sureties, they are not only bound, but are liable, though another surety may not be. *Ray v. State*, 268.

2. The suretyship of a married woman invalidates a bail bond as to her, but not as to the other sureties and the principal obligor. *Pickett v. State*, 648.

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SWINDLING.

1. Information to charge the offense of swindling must allege that some false representation as to existing facts or past events was made by the accused. Mere false promises or false professions of intention, though acted upon, are not sufficient. The information in this case charged, substantially, that defendant promised to pay one B. fifty cents for four certain fish, if said B. would deliver the same at his, defendant's, house; that B. did so deliver the fish, and that the said representations of the defendant were then and there false, etc. *Held*, that the information was insufficient to charge swindling or any other offense. *Allen v. State*, 150.

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SWINDLING—*continued.*

2. An indictment for swindling having unnecessarily described the money obtained by fraudulent representations to be "good, lawful and current money of the United States of America," it was essential to the validity of the conviction that the money be proved as alleged. *Chil. ders v. State*, 524.

3. See the opinion *in extenso* for evidence held insufficient to sustain a conviction for swindling. *Id.*

## T.

## THEFT.

See ACCOMPLICE EVIDENCE, 1. .

BAIL BOND, 6.

BURGLARY.

POSSESSION OF RECENTLY STOLEN PROPERTY, 2.

SCIRE FACIAS, 9.

VARIANCE, 1.

1. The defense was that the defendant honestly acquired possession of the alleged stolen animal, having won her at a game of cards from one H. The evidence was to the effect that K., the owner, turned the animal out on November 12. On the fourteenth day of the same month a witness saw said H. in possession of an animal suiting the description of the one stolen. After this the mare in question was seen on her range for a week or more. A defense witness testified that, a day or two before the defendant was found in possession of the animal in D. he saw the defendant win her from H. at a game of cards; that the mare was not then present, but H. said that she was running at large in a certain lane. Upon this state of evidence the court charged the jury: "If you believe from the evidence that the defendant won the mare in controversy from some person who claimed to be the owner of said animal, at a game of cards, and that he believed such person to be the owner, you will find the defendant not guilty, notwithstanding you may believe that such person was not in fact the owner of the mare." The court refused an additional charge to the effect that if defendant acquired possession of the mare in any way from H., who had stolen her, he would not be guilty of theft, though he may have known that H. stole her. *Held*, that the charge as given was sufficient; that though the principle invoked by the special charge is correct in the abstract, its refusal was not error in this case, in view of evidence which disclosed that even if H. had stolen the animal prior to that time, he had abandoned possession of her, and she was again on her range and in the constructive possession of her true owner. The doctrine applicable to this case is that, when subsequently taken from her range by the defendant, that act constituted another and distinct taking, and if such taking was fraudulent it was theft, although authorized by H. *Ashlock v. State*, 13.

2. It is a well settled rule of practice that, "when necessary to establish identity in developing the *res gesta*, or in making out the guilt of the accused by circumstances connected with the

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**THEFT—continued.**

theft, or to explain the intent with which the accused acted with respect to the property for the theft of which he is on trial, it is competent for the State to prove that other property was stolen at or about the same time and in the same neighborhood from which the property in question was stolen; and that this other property was found in the possession of the defendant when arrested for the theft of the property for which he is on trial. Under such state of case, however, it is the duty of the court to explain, in the charge to the jury, the purpose of such proof." *House v. State*, 25.

8. The indictment charged that the defendant, on July 30, 1883, in the Creek Nation, Indian Territory, did fraudulently take, steal and carry away from the possession of one B., three horses, the personal property of said B., without his consent, etc. That, on August 1, 1883, the said defendant did bring the said horses into the county of G., State of Texas. That on the said thirtieth day of July, 1888, the said acts of defendant constituted the offense of theft of horses, and were punishable as such, under and by virtue of the laws of the said Creek Nation, then in full force. *Held*, that the indictment was sufficient to charge the offense of horse theft, wherefore the motion in arrest of judgment was properly overruled. *Cowell v. State*, 57.

4. To constitute theft there must be an intent on the part of the person taking the property, at the time of the taking, to deprive the owner of the property of the value of the same, and to appropriate it to the use and benefit of the person taking. The word "it" has been properly held to refer to the antecedent word "property." In this case the indictment charges the intent as follows: "With the fraudulent intent to deprive the said Elisha Davis of the value of same, and to appropriate the value of the same"—using the word "value" instead of the word "it." *Held*, that the indictment is in substantial compliance with Article 420 of the Code of Criminal Procedure, and is therefore sufficient. *Thompson v. State*, 74.

5. Theft of ordinary property is a felony or misdemeanor according to whether the article stolen was worth as much as or more than twenty dollars, or less than that sum, and when that value is an issue to be determined in the trial, so as to ascertain the grade of the offense, it is the duty of the court to charge the jury upon the standard of value; which is the market value of the article if it have such a value, and if not, the amount it would cost to replace it. The requested charge in this case, though not properly embodying the law, was sufficient to call the attention of the trial court to the omission, and the failure to charge upon the standard of value was error. *Martínez v. State*, 122.

6. Any evidence from which the jury can infer the value of a stolen chattel is evidence; as, for instance, what the owner testifies of its value to him, the opinions of witnesses acquainted with the value of like property, what such property has brought at actual sales, etc. *Id.*

7. In a prosecution for the theft of a saddle, but one witness located the saddle in the possession of the defendant, and that witness was the party in whose possession it was found. Having testi-

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**THEFT—continued.**

fied that he purchased the saddle from the defendant, the defendant, for the purpose of laying a predicate to impeach the witness by showing his complicity in the theft, asked the witness on cross-examination the following question: "Did your wife, in your presence, at your house, and in the presence of Juan Montez and F. Gallan, on the tenth day of December, 1898, deny that the saddle was in your house, and deny all knowledge of said saddle?" *Held*, that for the purpose it was asked, the question was competent, and the exclusion of the answer thereto was error. *Id.*

8. Property that is lost, equally with other property, may be the subject of theft. To constitute theft of lost property, however, the fraudulent intent, which is the gist of the offense, must exist in the mind of the taker at the time of the taking; and in case of lost property, the time of the taking is the time of the finding of the property. If the fraudulent intent did not exist at the time of the taking, no subsequent fraudulent intent in relation to the property will constitute theft. Note, in the opinion, a summary of evidence which demanded of the trial court a charge embodying the principle announced. Note also a charge formulated by this court as responsive to this issue. *Id.*

9. Indictment for theft described the stolen property as "one twenty dollar gold piece of the value of twenty dollars, current money of the United States, and one five dollar bill in money of the value of five dollars, and one pocket knife of the value of fifty cents, of the corporeal personal property of J. W. McKnight." The motion in arrest of judgment alleged the insufficiency of the description of the alleged stolen property. *Held*, sufficient, under Article 732 of the Code of Criminal Procedure, which declares "money" to be "property," and under Article 427 of the same Code, which provides that, "when it becomes necessary to describe property of any kind in an indictment, a general description of the same by name, kind, quality, number and ownership, if known, shall be sufficient." The motion in arrest of judgment was properly overruled. *Bryant v. State*, 144.

10. Indictment for the theft of a watch and chain from the person of the owner alleged the aggregate value of the two articles. *Held*, not error to admit evidence of the value of the watch alone. *Bennett v. State*, 236.

11. Theft from the person is, *per se*, a felony without reference to the value of the article stolen, if of any value whatever. *Id.*

12. In a prosecution for the theft of a mare, the defendant proposed to prove by a witness that at the time he, the defendant, returned on the morning that he went out to hunt his two horses, and after he returned to the K. ranch, he stated to the witness that he, defendant, had failed to find but one of his horses; that some person had taken his other horse, and that he found the mare in question with his horse that was not taken; that he intended to take the said mare to Uvalde and see if he could find her owner; that he supposed the person who took his missing horse left the mare with his other horse—that if he could find the mare's owner in Uvalde county he would deliver

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**THEFT—continued.**

up the animal, and that he, the defendant, did not claim the mare. *Held*, that while not technically *res gesta*, the proposed evidence was competent, not only to show the character of defendant's possession, but the defendant's intent in connection with his possession; wherefore the court erred in excluding the proposed evidence. *Saltillo v. State*, 249.

13. See evidence *held* insufficient to support a conviction either for theft of a horse, or for driving it from its accustomed range. *Id.*

14. Under the statute in force prior to the adoption of the Revised Codes, the theft of a gelding was a specific offense. The word "horse" was not used in that statute in its comprehensive and generic sense, and did not include a "gelding," "mare" or "colt." Indictment for the theft of a gelding, presented before the adoption of the Revised Codes, properly described a stolen animal as a "gelding." *Johnson v. State*, 402.

15. To apply the new provision (Article 746 of the Revised Penal Code) in a trial for horse theft committed before the Revised Codes took effect would be *ex post facto*, and it has been properly *held* that a variance between the allegation and the proof is fatal to the conviction, notwithstanding the trial was held since the Revised Statutes took effect. *Id.*

16. See the statement of the case for evidence *held* insufficient to support a conviction for theft of a gelding, inasmuch as it fails to establish the identity of the defendant as the thief, beyond a reasonable doubt. *Id.*

17. A fraudulent taking is a necessary and an indispensable element of theft. In order to constitute that offense under our law it is not necessary that the property be removed any distance from the place of taking; it is sufficient if it has been in the possession of the thief, though it may not be moved out of the presence of the person deprived of it, nor is it necessary that any definite length of time shall elapse between the taking and the discovery thereof; if but a moment elapse, the offense is complete. *Madison v. State*, 485.

18. The facts in this case showed that the defendant, who claimed to own hogs running in the same range where the hogs in question were found, said that he supposed they belonged to him, called them up, and sold them to a third party, who, a day or two afterwards, took possession. The court, in substance, charged that the mere sale of the hogs was equivalent to a taking. *Held*, error; that in order to amount to theft, the seller of the stolen property must have had some manner of possession of the property. The rule is invariable that there must be an actual taking or a conversion of the stolen property in order to support a conviction for theft. *Id.*

19. Consistent with the doctrine stated is the rule that, "if the thief fraudulently procure a person innocent of any felonious intent to take the goods for him, his offense will be the same as if he had taken the goods himself." See the opinion and statement of the case for evidence *held* sufficient under this rule to show a taking and appropriation by the defendant. *Id.*

20. But see the statement of the case for evidence *held* insufficient to disclose a fraudulent intent, and therefore insufficient to support the conviction. *Id.*





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**THEFT—continued.**

from the grade of felony to misdemeanor, must be made under the following circumstances: 1. The return must be voluntary, that is, willingly made; not made under the influence of compulsion, fear of punishment or threats. If, however, it be made under the influence of repentance for the crime, and with the desire to make reparation to the injured owner, it will be voluntary, although it may also be influenced by fear of punishment. 2. It must be made within a reasonable time after the theft, and before prosecution for the theft has been commenced. 3. It must be an actual, not merely a constructive return of the property into the possession of the owner. 4. The property returned must be the identical property, unchanged and all of it, that was stolen. *Bird v. State*, 528.

26. In this case the defendant drove the stolen animal about ten miles from its range, and attempted to sell it. Pending negotiations of sale, it was discovered by parties acquainted with it, when the party with whom the sale was being negotiated told the defendant to turn it loose, and that they would get it at another time. In a few days the owner told the defendant that all he wanted was the animal, and that if he would drive it back home, he, the owner, would not prosecute him, the defendant. Soon after this the owner found the animal on its accustomed range. *Held*, that under such circumstances the court should have given in charge the issue as to the voluntary return of the animal by the defendant; that, while not strictly a return of actual possession, it was such as was demanded by the owner, and therefore sufficient. *Id.*

27. See the statement of the case for evidence *held* insufficient to sustain a conviction for theft, inasmuch as it fails to establish the ownership of the stolen property when it was taken, as alleged in the indictment; and because it fails to establish that the property was taken with a fraudulent intent to appropriate, etc. *Fletcher v. State*, 635.

**THEFT OF LOST PROPERTY.**

See **THEFT**, 8.

**THE "RULE."**

Professional physicians being called to testify solely as medical experts, it was proper to exempt them from the operation of "the rule." Moreover, the enforcement of the rule as to the sequestration of witnesses is matter largely committed to the discretion of the trial judge, and one which will not be revised unless injury to the defendant is made manifest. *Spear v. State*, 96.

**THREATS.**

See **RAPE**, 1, 2, 3.

**TRANSCRIPT.**

See **EVIDENCE**, 23.

1. See the opinion for suggestions to trial judges respecting the in-  
 cumbrance of transcripts with foreign matter. *Esareno v. State*, 65.